Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

ROBERT CHAMBERS, *et al.*,

Petitioners,

vs.

OHIO DEPARTMENT OF HUMAN SERVICES, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 42 U.S.C. § 1396r-5(e)(2)(C), which governs the calculation of eligibility of a married applicant for Medicaid, require a "resource-first" approach to determining Medicaid eligibility, or may state administrators, in their discretion, attribute "income" of the institutionalized spouse to the community spouse and mandate the spending down of many of the couple's joint resources before the institutionalized spouse can qualify for Medicaid benefits?

2. Did the court below improperly expand the principle of *Chevron* deference when it interpreted a statute whose meaning is plain on its face in a way that contradicts Congress's goal of preventing spousal impoverishment and when it based its deference on an inconclusive letter from a regional administrative officer which stated that the "income-first" rule advocated by the State of Ohio actually is not specified by 42 U.S.C. § 1396r-5(e)(2)(C)?

3. Did the court below have jurisdiction under the doctrine of "pendent appellate jurisdiction" to consider the Respondents' interlocutory appeal of an order issued on July 13, 1995, when the Respondents' notice of appeal was not filed until January 6, 1996?

4. Were the Respondents collaterally estopped from relitigating in district court the issue of whether 42 U.S.C. § 1396r-5(e)(2)(C) mandates a "resource-first" approach to calculating Medicaid eligibility by previous unfavorable state court rulings that had been issued against the Respondents on identical issues?

PARTIES TO THE PROCEEDING

The parties before the court of appeals were Robert Chambers, Jean Chambers, Lauren Holland, Sarah Holland, the class of other Ohioans similarly situated to the Chambers and the Hollands, the Ohio Department of Human Services, and its Director, Arnold Tompkins, in his official capacity.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	4
I. Certiorari Should Be Granted Because The Court Of Appeals Lacked Jurisdiction To Review The July 13, 1995, Interlocutory Order Entered By The District Court.	4
II. Substantive Reasons For Granting The Writ	8
A. The spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988 neither require nor authorize the shifting of income from the institutionalized spouse to the community spouse before eligibility for Medicaid nursing home benefits is ascertained.	10

Table of Contents

Page

1. Statutory Background 10

   a. Preliminary assessment of couple's resources and income to determine eligibility for Medicaid. 11

   b. Revision of the Community Spouse Resource Allowance under 42 U.S.C. § 1396r-5(e)(2)(C) in order to allow the Community Spouse to satisfy the MMMNA. 14

2. The decision of the Sixth Circuit violates the express language of 42 U.S.C. § 1396r-5(e)(2)(C) which authorizes a shift of resources to the community spouse up to the amount needed to satisfy the MMMNA, thereby frustrating the intent of Congress. 16

3. The decision below improperly applies and expands the precedent of this Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). 21

4. The Respondents are barred by principles of collateral estoppel from relitigating the issue of the proper interpretation of 42 U.S.C. § 1396r-5(e)(2)(C) because they had a full and fair opportunity to litigate the identical

Page

issue in two previous state court proceedings and have obtained decisions rejecting their interpretation both times. 24

5. The issue presented is national in scope, vital in nature, and likely to arise again. 26

Conclusion 29

TABLE OF CITED AUTHORITIES

Cases Cited:

Allen v. McCurry, 449 U.S. 90 (1980) 25

Beach v. Ocwen Federal Bank, 66 U.S.L.W. 4263 ... 10

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 23

Buckhannon v. Percy, 708 F.2d 1209 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984) 6, 7

Chambers v. Ohio Department of Human Services, 145 F.3d 793 (6th Cir. 1998) 1, 3, 5, 6, 18, 26

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) ..... i, 10, 21, 22, 23, 24

Table of Cited Authorities

Page

Cleary v. Waldman, 959 F. Supp. 222 (D.N.J. 1997) 27

Dole v. United Steelworkers of America, 494 U.S. 26 (1990) 21

Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) 5

Golf v. Department of Social Services, 1998 W.L. 151293 (N.Y. Ct. App. 1998) 27

Goodson v. McDonough Power Equipment, Inc., 443 N.E. 2d 978 (Oh. 1983) 25

Gruber v. Ohio Department of Human Services, 647 N.E. 2d 861 (5th Dist. Ct. App. 1995), *discretionary appeal not allowed*, 646 N.E. 2d 468 (Oh. 1995) 2, 12, 16, 20, 24, 25, 27

Hicks v. De La Cruz, 369 N.E. 2d 776 (Oh. 1977) ... 25

Kimnach v. Ohio Department of Human Services, 645 N.E. 2d 825 (10th Dist. Ct. App. 1994), *discretionary appeal not allowed*, 644 N.E. 2d 409 (Oh. 1995) 2, 16, 20, 24, 25, 27

Merrel-National Laboratories, Inc. v. Zenith Laboratories, Inc., 579 F.2d 786 (3rd Cir. 1978) .. 7, 8

Presley v. Etowah County Commission, 502 U.S. 491 (1992) 21

Table of Cited Authorities

	Page
Quern v. Jordan, 440 U.S. 332 (1979)	3
Rowan Cos. v. United States, 432 U.S. 247 (1981)	23
Schweiker v. Gray Panthers, 453 U.S. 32 (1983)	11
Securities Industry Association v. Board of Governors, 468 U.S. 137 (1984)	22
Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996)	23
Trautwein v. Sorgenfrei, 391 N.E. 2d 326 (1979)	25
United States v. Fort Sill Apache Tribe, 507 F.2d 861 (Ct. Claims 1974)	8
United States v. Robinson, 361 U.S. 220 (1960)	5
Statutes Cited:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1292(a)	4
28 U.S.C. § 1292(a)(1)	4, 5, 6
28 U.S.C. § 1292(b)	5
28 U.S.C. § 1331	3

Table of Cited Authorities

Page

42 U.S.C. §§ 1396 *et seq.* 10

42 U.S.C. § 1396r-5 .....1, 11, 12, 20, 27, 28, 29

42 U.S.C. § 1396r-5(a) 11

42 U.S.C. § 1396r-5(b) 12

42 U.S.C. § 1396r-5(b)(1) 12, 19, 20

42 U.S.C. § 1396r-5(c)(2) 13

42 U.S.C. § 1396r-5(c)(5) 12

42 U.S.C. § 1396r-5(d)(1)(A) 15

42 U.S.C. § 1396r-5(d)(1)(B) 17, 19

42 U.S.C. § 1396r-5(d)(3) 12

42 U.S.C. § 1396r-5(d)(4) 12

42 U.S.C. § 1396r-5(e)(1) 13

42 U.S.C. § 1396r-5(e)(2)(C) .....
.....i, 1, 2, 3, 14, 15, 16, 17, 24, 25

42 U.S.C. § 1396r-5(f)(2) 13

42 U.S.C. § 1396r-5(h) 11

Table of Cited Authorities

Page

United States Constitution Cited:

Eleventh Amendment 3, 5, 6, 7

Rules Cited:

Federal Appellate Rule 4(a) 5

Federal Appellate Rule 4(a)(1) 5, 6

Other Authorities Cited:

134 Cong. Rec. S7401 (daily ed. June 8, 1988) 11

House Committee Report No. 100-391, 100th Cong., 1st Sess. (1987) 20

APPENDIX

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Filed May 27, 1998 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Ohio Filed December 14, 1995 ..... 26a

Appendix C — Order Of The United States District Court For The Southern District Of Ohio Filed July 13, 1995 ..... 32a

Appendix D — Order In The United States District Court For The Southern District Of Ohio Filed March 31, 1995 ..... 62a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Chambers v. Ohio Department of Human Services,* 145 F.3d 793 (6th Cir. 1998). The interlocutory orders of the district court of March 31, 1995, July 13, 1995, and December 14, 1995, are not published, but are included in Appendices B, C & D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("court of appeals") was entered on May 27, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the interrelated rules for calculating Medicaid eligibility set forth in 42 U.S.C. § 1396r-5. Primarily, however, the appeal focuses on 42 U.S.C. § 1396r-5(e)(2)(C) which states:

> **Revision of the community spouse resource allowance**
>
> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance.

STATEMENT OF THE CASE

The Chambers and the Hollands (the "Petitioners"), elderly couples, each with one spouse institutionalized in a nursing home, filed this class action in the Common Pleas Court in Franklin County, Ohio. The Petitioners alleged, *inter alia*, that the Ohio Department of Human Services (**"ODHS"**) has long been improperly determining Medicaid eligibility for married couples by failing to provide a revision of the resource allowance as provided by the Medicare Catastrophic Coverage Act of 1988 (**"the MCCA"**), and by arbitrarily refusing to apply a "resource-first" rule for the transfer of assets between spouses when one spouse is institutionalized ("the institutionalized spouse") and the other remains in the community ("the community spouse"). Instead of using a resource-first rule, the ODHS advocated in this litigation an "income-first" rule as the proper method of calculating Medicaid eligibility (and the courts below based their decisions on this litigation posture), though to this day the ODHS has never adopted by policy or regulation an income-first rule, or any other official approach to making these vital eligibility calculations.

As a result of ODHS' refusal to employ the resource-first rule specified in 42 U.S.C. § 1396r-5(e)(2)(C), the Petitioners alleged that married couples were improperly being forced to spend down large amounts of their joint resources before the institutionalized spouse would be considered to be eligible for Medicaid by the ODHS. Indeed, two Ohio appellate courts had already ruled against ODHS on this point and held that its methods of calculating Medicaid eligibility violated the express language of 42 U.S.C. § 1396r-5(e)(2)(C), as well as the agency's own administrative regulations. *Kimnach v. Ohio Department of Human Services*, 645 N.E. 2d 825 (10th Dist. Ct. App. 1994), *discretionary appeal not allowed*, 644 N.E. 2d 409 (Oh. 1995); *Gruber v. Ohio Department of Human Services*, 647 N.E. 2d 861 (5th Dist. Ct. App. 1995), *discretionary appeal not allowed*, 646 N.E. 2d 468 (Oh. 1995).

Faced with unfavorable state court rulings, the Respondents removed the instant class action to district court asserting federal question jurisdiction pursuant to 28 U.S.C. § 1331. In federal court, the Respondents moved for dismissal of the case or summary judgment, and the Petitioners moved for partial summary judgment. On July 13, 1995, the district court granted the Petitioners' motion for partial summary judgment, declared that 42 U.S.C. § 1396r-5(e)(2)(C) mandated the resource-first approach urged by the Petitioners, and ordered the Respondents to revise their Medicaid forms to reflect an accurate interpretation of the federal Medicaid laws. Significantly, the Respondents did not appeal from the July 13, 1995, order until January 5, 1996.

On December 14, 1995, the district court further ordered the Respondents to send a *Quern*-type notice[1] to members of the plaintiff class (the certification of which the Respondents stipulated to) informing them of the results of the court's July 13, 1995, order and that state law may provide a remedy to them for any past erroneous denials of eligibility or benefits. On January 5, 1996, The Respondents sought an emergency stay of the December 14, 1995, order from the Sixth Circuit, alleging that the sending of the notice violated the Eleventh Amendment because it was tantamount to a direct monetary award against the State. At that time, the Respondents also filed a notice of appeal as to the July 13, 1995, order interpreting the Medicaid laws, and the March 31, 1995, order certifying the class by stipulation of the parties.

On May 27, 1998, the court of appeals reversed both the July 13 and December 14 orders of the district court (though it did not address the March 31 order certifying the class, 145 F.3d at n.3). It held that the statute is ambiguous and that the district court had

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1. This term is used to refer to the sort of class wide notice approved by this Court as not violating the Eleventh Amendment in *Quern v. Jordan*, 440 U.S. 332 (1979).

erred in not deferring to the interpretation of the MCCA urged by the Respondents.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS LACKED JURISDICTION TO REVIEW THE JULY 13, 1995, INTERLOCUTORY ORDER ENTERED BY THE DISTRICT COURT.

The court of appeals lacked jurisdiction to enter its decision in this case. Despite the lack of a final judgment in the instant action, the respondents appealed to the circuit court, purportedly pursuant to 28 U.S.C. § 1292(a), from three interlocutory orders issued by the trial court:

1. the March 31, 1995, order certifying the plaintiff class pursuant to the stipulation of the parties ["the March 31 order"];

2. the July 13, 1995, order granting partial summary judgment in favor of the Appellees on their claims for declaratory and injunctive relief ["the July 13 order"]; and

3. the December 14, 1995, order granting further relief to the Appellees, primarily by ordering the Appellant to provide *Quern*-type notice to members of the Appellee class regarding the outcome of this law suit and potential remedies that may be available to them under state law ["the December 14 order"].

The respondents did not file a notice of appeal until January 6, 1996, purporting to appeal as of right under 28 U.S.C.

§ 1292(a)(1), from the March 31 and July 13 orders, as well as the December 14 order. Thus, they did not comply with Federal Appellate Rule 4(a) and file a notice of appeal within 30 days after issuance of either the March 31 or July 13 orders.[2] The Respondents also did not seek a permissive interlocutory appeal of these orders under 28 U.S.C. § 1292(b).

Despite the obvious defect in the respondents' attempted interlocutory appeal of the July 13 order, the Sixth Circuit reviewed and reversed it, as well as the December 14 order, using the doctrine of "pendent appellate jurisdiction." 145 F.3d at 797. It held that although the respondents had not timely appealed from the district court's July 13 interlocutory order, it "simply does not make sense" to review the propriety of the notice to the class under the Eleventh Amendment without reviewing the underlying merits of the case. *Id.* This holding ignores the unequivocal teaching of this Court that timely filing of a notice of appeal is "mandatory and jurisdictional," and the failure of a litigant to comply with this statutory prerequisite deprives the court of jurisdiction over the appeal. *United States v. Robinson*, 361 U.S. 220, 224 (1960). The interlocutory appeal exception created by 28 U.S.C. § 1292(a)(1) to "the long-established policy against piecemeal appeals . . . is a narrow one" that should not be readily expanded by the courts. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978).

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2. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides in relevant part that

> in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.

The July 13 order is the central order in this case — it granted prospective injunctive relief, as well as declaratory relief, against the Respondents and thus probably was initially an appealable interlocutory order under 28 U.S.C. § 1292(a)(1), even though it disposed of less than all of the petitioners' claims. However, by declining to file a notice of appeal of the July 13 order within the requisite 30 day period, Federal Appellate Rule 4(a)(1), respondents missed their chance to perfect an interlocutory appeal. The Sixth Circuit could not waive this defect in jurisdiction by allowing the respondents to bootstrap their appeal of the MCCA's resource-first approach to what even the Sixth Circuit conceded is the "distinct issue" of notice to the class addressed by the December 14 order. 145 F.3d at 797.

Moreover, the circuit court's consideration of the appeal of the July 13 order directly contradicts the rulings of at least two other federal circuit courts of appeals, creating a conflict that should be resolved by this Court. The Seventh Circuit rejected an appeal remarkably similar to that of the respondents here. In, *Buckhannon v. Percy*, 708 F.2d 1209, 1212-14 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984), the district court, like the trial court here, ordered officials in the Wisconsin Department of Human Services to reinstate certain benefits to members of the plaintiff class, and ordered the defendants to submit proposed revised notices to the court. *Id.* at 1211. The officials did not appeal this injunctive order but thereafter, like the respondents here, questioned whether issuance of the notices and the payment of certain benefits violated the Eleventh Amendment. The district court issued another order rejecting the Eleventh Amendment argument and the officials perfected a timely appeal from this second order.

In determining the scope of its appellate review, the Seventh Circuit considered whether its jurisdiction was limited to the Eleventh Amendment question, or whether it extended (as the Sixth Circuit found here) to all aspects of the injunction that had been issued earlier. *Id.* at 1213. Judge Cudahy, joined by Judges Posner

and Holder, decided that the **officials** properly could only raise the "analytically separate" Eleventh Amendment issue on appeal, but could not reopen the provisions of the earlier issued injunction from which they had not appealed:

> The Department had thirty days to appeal in January of 1982 [from the original injunctive order]. Fed. R. App. P. 4. Rather than take advantage of this opportunity, the Department brought the notices being used into conformity with Judge Warren's order in the space of one week. Its only reason for bringing up the notice question once again is a desire to escape the consequences of paying the January benefit by obtaining a belated holding on appeal that the original notices were adequate. In short, this is precisely the type of judgment protected by finality.

Id. at 1214.

The same reasoning is applicable to the Respondents' efforts to cure their failure to appeal from the original injunctive order of July 13. Respondents may not bootstrap their appeal of the analytically distinct Eleventh Amendment issue into a belated interlocutory appeal of the earlier injunction which they chose to let stand.

To the same effect is the decision of the Third Circuit Court of Appeals in *Merrel-National Laboratories, Inc. v. Zenith Laboratories, Inc.*, 579 F.2d 786 (3rd Cir. 1978). There, the court held that the appellants, which had failed to file a notice of appeal as to the granting of a preliminary injunction while a motion to reconsider was pending before the district judge, could not rely on the denial of the reconsideration to render timely their appeal of the original injunctive order. Application of the final judgment rule was appropriate, particularly in light of the fact that the Appellants did not "face the loss of the right to appeal a final

judgment, but only the lesser hardship of losing the right to appeal an interlocutory order." *Id.* at 790. *See also United States v. Fort Sill Apache Tribe*, 507 F.2d 861 (Ct. Claims 1974)(holding that an interlocutory appeal cannot be made to carry with it all previous orders or rulings, unless they enter into and are "subsumed" by the appealable ruling).

The Sixth Circuit erred in "backdating" the Respondents' notice of appeal to take in the earlier interlocutory order they had chosen not to appeal. This Court should grant certiorari to correct this jurisdictional defect and resolve the split in the circuits created by the Sixth Circuit's ruling.

II.

SUBSTANTIVE REASONS FOR GRANTING THE WRIT

This case concerns how married couples are to pay for nursing home care when one of them is institutionalized and the other remains in the community. The court below became the first federal appellate court to rule definitively on how much of a married couple's joint resources the community spouse can retain for her[3] own support without disqualifying her institutionalized spouse from receiving Medicaid benefits for his nursing home care. By endorsing the State of Ohio's purported income-first method[4] of

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3. For purposes of discussion, the institutionalized spouse will be referred to using masculine pronouns and the community spouse will be referred to using feminine pronouns. This usage is common parlance in discussing spousal Medicaid rules because it reflects the typical Medicaid scenario. However, such usage does not mean that different rules are in effect when the genders are switched.

4. It should be noted that although the ODHS advanced in this litigation an income-first rule as the proper method of calculating Medicaid eligibility (and

(Cont'd)

calculating Medicaid eligibility which attributes the income of the institutionalized spouse (most commonly, his social security benefits) to the community spouse before allowing her to retain joint resources (typically, savings), the court answered the question in a way that benefits the budgets of state administrators and harshly shortchanges community spouses. This flawed interpretation of the Medicare Catastrophic Coverage Act of 1988 **["the MCCA"]**, contradicts the express language of the statute and runs counter to Congressional intentions that one's eligibility for Medicaid should not be conditioned on his spouse's impoverishment.

The decision of the Sixth Circuit should be reviewed by this Court because it fundamentally misinterprets federal Medicaid law in a way that will profoundly disadvantage hundreds of thousands of elderly, married Americans who are receiving care in nursing homes, and their spouses. If allowed to stand, the ruling threatens to frustrate the expressed goal of Congress to eliminate spousal impoverishment as a prerequisite for receipt of federal Medicaid benefits that pay for nursing home care. Nationwide, institutionalized individuals and their spouses will be forced to "spend down" their savings to receive Medicaid nursing home benefits, leaving the community spouse without sufficient income or assets. Contrary to Congressional intentions that Medicaid should benefit a broad range of elderly Americans, the decision effectively confines Medicaid assistance only to the poorest individuals by forcing moderately secure couples to liquidate most of their joint savings before the institutionalized spouse can qualify for federal benefits.

(Cont'd)

the courts below without comment based their decisions on this litigation posture), the ODHS has never officially adopted by policy or regulation an income-first rule and has applied such a rule only on an ad hoc basis. Thus, the deference argument ultimately relied on by the court of appeals rests on a foundation of administrative practice that is less stable than sand.

The Sixth Circuit's interpretation of the MCCA conflicts with state court rulings holding that the income-first approach is nowhere authorized by federal law, thereby creating uncertainty in the meaning of the statute governing Medicaid practices nationwide. Consequently, prompt review by this Court is called for. *See Beach v. Ocwen Federal Bank*, 66 U.S.L.W. 4263, 4264 and n.5 (1998)(granting certiorari to resolve conflict with decisions of several other courts created by Florida Supreme Court's interpretation of Truth in Lending Act).

Finally, the lower court's ruling distorts the principle of judicial deference to reasonable agency interpretations of an ambiguous statue beyond the bounds set forth by this Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). By resting its decision on an inconclusive regional agency letter that actually states that the income-first rule is not supported by the language of the MCCA, the circuit court dangerously expanded *Chevron* deference far beyond its moorings as a reasonable principle of statutory interpretation, and transformed it into an excuse for courts to ignore the plain intentions of Congress.

A. The spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988 neither require nor authorize the shifting of income from the institutionalized spouse to the community spouse before eligibility for Medicaid nursing home benefits is ascertained.

Because this case turns on the Sixth Circuit's interpretation of a key provision of the MCCA, it is necessary to review the statutory framework against which the decision below was entered.

1. Statutory Background

The Medicare Catastrophic Coverage Act of 1988, 42 U.S.C. §§ 1396 *et seq.*, created a federal conditional spending program designed to assist participating states in providing subsidized

medical care to the elderly, the disabled, and the poor. Ohio has elected to participate and, accordingly, its Medicaid plans must comply with federal law and with the regulations promulgated by the Secretary of the U.S. Department of Health and Human Services. *See Schweiker v. Gray Panthers*, 453 U.S. 32 (1983).

The provisions of the MCCA that the district court and two other Ohio courts found the Respondents were violating are codified at 42 U.S.C. § 1396r-5. These "spousal impoverishment" sections of the MCCA govern the treatment of income and resources of married couples for purposes of determining Medicaid eligibility where one spouse has been institutionalized ("the institutionalized spouse") and the other remains in the community ("the community spouse"). 42 U.S.C. §§ 1396r-5(a) and (h). These provisions were enacted in order to "prevent the paradox of spousal impoverishment [so that] Seniors [would] no longer have to dissipate the savings of a lifetime to qualify for health care assistance." 134 Cong. Rec. S7401 (daily ed. June 8, 1988)(statement of Sen. Simon).

a. Preliminary assessment of couple's resources and income to determine eligibility for Medicaid.

Because married couples typically hold many of their assets jointly, Congress had to address the issue of what portion of those joint assets the community spouse could retain without disqualifying her institutionalized spouse from receiving Medicaid. If all of the couples' assets could be retained by the community spouse, with none being deemed available to the institutionalized spouse, Medicaid would effectively be available to everyone, even the wealthiest Americans. Conversely, if all of the couple's assets were deemed to be available to the institutionalized spouse, then he would have to "spend down" the joint savings of a lifetime — including those his wife needed to live in the community — before he could be eligible for a penny of Medicaid benefits to pay for his nursing home expenses.

The spousal impoverishment provisions of the MCCA adopt a middle ground that allows the institutionalized spouse to qualify for Medicaid at the same time that the community spouse retains a baseline level of her own income, and a portion of the joint resources, sufficient to achieve a minimum monthly income level, the "minimum monthly maintenance needs allowance" **[hereinafter, "the MMMNA"]**. 42 U.S.C. § 1396r-5(d)(3)[5]. It accomplishes this result through a complicated but sensible scheme set forth in 42 U.S.C. § 1396r-5, that distinguishes between the couple's resources and income. Resources are "roughly equivalent to capital [or savings], while income corresponds to the interest earned on that capital or additional income such as social security benefits." *Gruber v. Ohio Dept. of Human Services*, 647 N.E. 2d 861, 864 (5th Dist. Ct. App. 1995), *discretionary appeal not allowed*, 646 N.E. 2d 468 (Oh. 1995).

As the Sixth Circuit correctly noted, in counting *income* for purposes of determining eligibility for institutionalized individuals with a community spouse, the MCCA adopts a "name on the check" approach, attributing income to whomever the instrument is payable, with joint income being split equally between the institutionalized and the community spouse. 42 U.S.C. § 1396r-5(b). The community spouse may retain an unlimited amount of her income without jeopardizing her spouse's eligibility for Medicaid. 42 U.S.C. § 1396r-5(b)(1). The institutionalized spouse's income is applied to his nursing home expenses.

The MCCA takes an entirely different approach to the assessment of *resources*,[6] effectively pooling together most of the

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5. The MMNA is 150 percent of the federal poverty level for a couple, plus certain shelter expenses, up to a cap of $1,500. 42 U.S.C. § 1396r-5(d)(3) and (4).

6. Resources do not include certain necessities such as the marital home, household goods, personal belongings, and some automobile and burial expenses. 42 U.S.C. § 1396r-5(c)(5).

couple's non-income assets before determining what amount is available to the institutionalized spouse. In counting resources for purposes of determining eligibility, the MCCA first allocates joint resources equally between the institutionalized and community spouses. 42 U.S.C. § 1396r-5(c)(2). The spousal impoverishment provisions of the MCCA expressly permit the community spouse to retain a statutorily established amount of resources to a maximum of $80,760.00 and a minimum of $16,152 (1998 levels), known as the "community spouse resource allowance" **[hereinafter, "the CSRA"]**. *Id.*; 42 U.S.C. § 1396r-5(f)(2). Resources of the community spouse that exceed the CSRA are then attributed to the institutionalized spouse for purposes of determining eligibility for Medicaid. 42 U.S.C. § 1396r-5(c)(2).

Based on this initial attribution of resources, an assessment is made of whether the institutionalized spouse is eligible for Medicaid benefits. If the institutionalized spouse has resources exceeding a certain amount (currently $1,500 in Ohio) attributed to him, he must "spend down" the excess before he will be eligible for benefits. Obviously, the greater the amount of the couple's joint resources that are attributed to the institutionalized spouse, the more money that will have to be "spent down" on his nursing home care. The couple must be informed of the institutionalized spouse's preliminary eligibility status and of the amounts of the initial CRSA and MMMNA calculations made by state administrators. 42 U.S.C. § 1396r-5(e)(1).

In the event that the community spouse retains sufficient resources that generate income (typically in the form of interest or returns paid on the resources), combined with her own income, to satisfy MMMNA, then as all parties agree, the institutionalized spouse must spend down his share of the couple's resources as well as his own income to pay for his nursing care expenses before qualifying for Medicaid benefits. However, it is the more common scenario where the community spouse does not have enough

income to satisfy the MMMNA at the time of the initial assessment, that gives rise to this case.

b. Revision of the Community Spouse Resource Allowance under 42 U.S.C. § 1396r-5(e)(2)(C) in order to allow the Community Spouse to satisfy the MMMNA.

In order to achieve Congress' goal of protecting the community spouse against impoverishment, the MCCA requires that an additional amount of the couple's assets "shall" be shifted to the community spouse when the preliminary assessment of resources and income results in her income being less than the MMMNA. 42 U.S.C. § 1396r-5(e)(2)(C). The nature of the assets shifted — whether resources or income — has profound implications for the future economic security of the community spouse. For example, if *income* such as the institutionalized spouse's social security payment is first shifted to the community spouse to satisfy the MMNA (as the court below held), those monies will often disappear or be significantly reduced upon the death of the institutionalized spouse. Because the one half of the couple's resources will usually have been spent down to satisfy the nursing home expenses of the institutionalized spouse, the widowed community spouse may end up impoverished because she no longer has enough fixed income and investment income to satisfy the MMMNA . On the other hand, if *resources* (*i.e.*, savings) are first transferred from the institutionalized spouse to the community spouse, allowing her to achieve the MMNA by investing these resources, she is more likely to retain those funds after the institutionalized spouse's death and thus has a greater likelihood of continuing to subsist at the MMMNA.

Each of these approaches has distinct policy advantages which might be debated were the issue presented as a *tabula rasa*, with the resource-first approach better protecting the needs of the community spouse and the income-first approach arguably favoring the public fisc. However, Congress resolved this

question, which lies at the heart of this case, in favor of shifting *resources* first in order to bring the community spouse up to the MMMNA. As all parties agree, the dispositive statutory provision is 42 U.S.C. § 1396r-5(e)(2)(C), which provides for a hearing at which the community spouse, upon establishing that she falls short of satisfying the MMMNA, may increase the amount available to her by substituting a larger "community spouse *resource* allowance" necessary to meet the MMMNA. *Id.* (emphasis supplied).[7] 42 U.S.C. § 1396r-5(e)(2)(C) (emphasis supplied). Nowhere does the statute provide that prior to determining eligibility for Medicaid,[8] income may be shifted to the community spouse to help her to satisfy the MMMNA.

However, despite this statutory language plainly mandating a revision of the resource allowance, the respondents continue to assert that an income-first approach is permissible under the statute. (Indeed, the Respondents' disregard for the statute is demonstrated

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7. The statute reads as follows:

> **(C) Revision of the community spouse resource allowance**
>
> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, *there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.*

8. 42 U.S.C. § 1396r-5(d)(1)(A) does provide that income of the institutionalized spouse may be shifted to the community spouse, but only *after* the institutionalized spouse has be determined to be eligible for Medicaid, by which time the resources have been allocated. The instant case deals with the allocation of resources prior to determining eligibility, a matter that necessarily must be resolved before a transfer of income under § 1396r-5(d)(1)(A) can occur.

by the fact that their income-first approach is itself a fall back position taken in defending this action — before this law suit was filed, Ohio *as a matter of course made no shift of income or resources* to bring the community spouse up to the level of the MMMNA, leaving community spouses in truly dire economic straits). It therefore is vital that this Court grant certiorari in order to correct the Respondents' misapplication of the MCCA.

2. The decision of the Sixth Circuit violates the express language of 42 U.S.C. § 1396r-5(e)(2)(C) which authorizes a shift of resources to the community spouse up to the amount needed to satisfy the MMMNA, thereby frustrating the intent of Congress.

The court below held that Congress left it up to each state to decide for itself whether it wishes to adopt an income-first or resource-first approach in calculating Medicaid eligibility where the community spouse lacks sufficient funds to satisfy the MMMNA. The Sixth Circuit's holding ignores the express language of what concededly is the crucial statutory provision governing this determination, 42 U.S.C. § 1396r-5(e)(2)(C). By endorsing the respondents' income-first policy in contravention of the statute, the court's decision frustrates Congress' stated goal of eliminating spousal impoverishment as a condition for the receipt of Medicaid.

The district court, as well as well as two state courts,[9] recognized that 42 U.S.C. § 1396r-5(e)(2)(C), does not support the respondents' assertion that Congress intended to mandate an income-first rule. The statute makes no mention of such a pre-eligibility shift of income to the community spouse. Instead, the

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9. *Kimnach v. Ohio Department of Human Services*, 645 N.E. 2d 825 (10th Dist. Ct. App. 1994), *discretionary appeal not allowed*, 644 N.E. 2d 409 (Oh. 1995); *Gruber v. Ohio Department of Human Services*, 647 N.E. 2d 861 (5th Dist. Ct. App. 1995), *discretionary appeal not allowed*, 646 N.E. 2d 468 (Oh. 1995).

statute authorizes a revision of the community spouse *resource* allowance, not a shift in income—a point made clear by the statute's repeated use of "resources" as the means employed to generate additional "income" for the community spouse:

> **(C) Revision of the community spouse resource allowance**
>
> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(e)(2)(C). The MCCA does indeed authorize a shift of income from the institutionalized spouse to the community spouse, but only *after* the institutionalized spouse has been determined to be eligible for Medicaid and the community spouse still has not achieved the MMMNA. 42 U.S.C. § 1396r-5(d)(1)(B).

Thus, *at the time that eligibility is determined,* the revision of the resource allowance is the sole means of bringing the community spouse up to the MMMNA mentioned by the statute. The statute's stated preference for a resource shift prior to determining eligibility makes sense because any resources retained by the institutionalized spouse will have to be spent down for him to qualify for Medicaid benefits. If resources are to be shifted, this must be done prior to determining eligibility, or not at all. Income on the other hand, most commonly in the form of social security payments, will usually continue to be available to the institutionalized spouse and can be transferred after all of the resources have been disposed of and the institutionalized spouse has become eligible for Medicaid

if that is still necessary to bring the community spouse up to the MMMNA.[10]

Notwithstanding this straightforward statutory scheme, the circuit court reasoned that a pre-eligibility shift of income is also an appropriate means of raising the community spouse to the MMMNA because the MCCA "does not prohibit the pre-eligibility transfer of income from the institutionalized spouse to the community spouse." 145 F.3d at 802. Quite frankly, it borders on the nonsensical to assume that when Congress specified only a

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10. The statutory scheme can be summarized as follows:

1. Preliminary division of resources and assessment of CRSA and MMMNA to determine whether IS qualifies for Medicaid. Income of couple is divided by name on check; resources divided equally and CRSA amount allocated to CS. 42 U.S.C. §§ 1396r-5(b) and (c).

2. CS who does not satisfy MMMNA based on income generated by CRSA, coupled with her own "name on check" income, to may request fair hearing. 42 U.S.C. § 1396r-5(e)(2).

3. If it is established that CRSA is inadequate to raise CS to MMMNA, a higher CRSA (share of couple's resources) shall be substituted to bring CS up to MMMNA. 42 U.S.C. § 1396r-5(e)(2)(C).

4. Eligibility of IS for Medicaid is determined. If IS still retains resources above $1500, those must be spent down. If all of IS's resources have been transferred to CS in form of CRSA revision, IS is eligible for Medicaid.

5. After eligibility, if CS still does not have enough income after revision of CRSA to satisfy MMMNA, income of the IS may now be made available to the CS instead of being applied to costs of care in institution. 42 U.S.C. § 1396r-5(d)(1)(B).

revision of the resource allowance to bring the community spouse up to the MMMNA prior to eligibility, it intended also to allow a critically different means of accomplishing the same result because it did not expressly prohibit the alternative approach. Such a method of "statutory interpretation" would mean that in addition to specifying the method that Congress wished to employ in implementing the MCCA, it should also have anticipated and expressly negated all other possible means which might conceivably be used to implement the statute.

The circuit court's reading of the MCCA likewise renders meaningless the plain language of 42 U.S.C. § 1396r-5(d)(1)(B). If the circuit court were correct that pre-eligibility shifts of income are permissible, there would have been no need for Congress to include the only provision authorizing shifts of income to the community spouse in a section describing what happens "[*a*]*fter* an institutionalized spouse has been determined" to be eligible for Medicaid. Judicial negation of this important statutory language cannot be allowed to stand.

The circuit court's reading does further violence to the statutory scheme because it ignores 42 U.S.C. § 1396r-5(b)(1) which unequivocally states that (subject to certain exceptions once eligibility for Medicaid is established)[11] the income of the

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11. It should be noted that the MCCA does allows a transfer of income to the community spouse, but under the express terms of § 1396r-5(d)(1)(B) this transfer of income does not occur until *after eligibility* for Medicaid has been determined. The district court observed in this regard:

> [T]he transfer of income is addressed in an entirely different section [from the resource transfer provisions.] Section 1396r-5(d)(1) calls for an amount of income held by the institutional spouse to be applied toward monthly institutional costs. This provision also allows a deduction

(Cont'd)

community spouse and the institutionalized spouse are to be treated separately during any month of institutionalization. According to the statute, "no income of the community spouse shall be deemed available to the institutionalized spouse." *Id.* The goal of this provision was to ensure that with respect to income, "upon institutionalization, each spouse is treated as a separate household." House Committee Report No. 100-391, 100th Cong., 1st Sess. (1987). The income-first rule is inconsistent with this approach because it shifts to the community spouse income of the institutionalized spouse at a time when the statute is concerned only with allocating the resources of the couple. Tellingly, the circuit court ignored each of these provisions.

The district court, as well as the *Kimnach* and *Gruber* courts, quite rightly recognized that what the respondents and the circuit court call a "reading" of the statute is actually a rewriting of it. As these courts cogently observed, there simply is no provision in section 1396r-5 that permits a pre-eligibility income transfer. *E.g.*, *Gruber*, 647 N.E. 2d at 868 ("There is absolutely no language in the MCCA that mandates" the "income-first" rule). Congress set forth in the statute a logical, straightforward approach to shifting resources and income which the circuit court refused to heed, thereby threatening the financial security of thousands of elderly Americans. Certiorari is the only means of remedying this pernicious mistake.

(Cont'd)

> from this amount, the community spouse monthly income allowance, if the community spouse's income falls short of the MMMNA. This deduction cannot occur until after eligibility is determined. Resources, however, can be transferred before eligibility is determined.

Order at p. 17 (Jul. 13, 1995).

3. *The decision below improperly applies and expands the precedent of this Court in Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).*

The circuit court also grievously erred in applying this Court's holding in *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). First, the circuit court misused *Chevron* deference to interpret a statute whose meaning is plain on its face in a way that frustrates Congressional intent to prevent spousal impoverishment. Second, contrary to *Chevron*, the court deferred to an inconclusive regional letter of the United States Department of Health and Human Services (**"HHS"**) that in fact stated that the income first rule is not specified by the MCCA. Such a radical expansion of *Chevron's* holding should be reviewed by this Court because if allowed to stand, it threatens to turn a sensible rule of statutory interpretation into a vehicle for wholesale abdication by courts of their duty to enforce the laws of the United States.

Chevron deference was improper in the instant case because the MCCA plainly and unambiguously sets out the manner and timing for the shifting of resources and income, making no provision for a pre-eligibility shift of income. The circuit court ignored this Court's repeated admonition that *Chevron* deference is appropriate "only if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley v. Etowah County Commission,* 502 U.S. 491,508 (1992). Even assuming for the moment that the HHS had issued an interpretation that the statute mandates an "income-first" approach, such a reading of the statute contravenes the statutory scheme Congress expressly set forth in the MCCA and is manifestly unreasonable. Thus, the court below engaged not in "deference" under *Chevron,* but an improper abdication of its duty to enforce the statute as written by Congress, contrary to this Court's teachings. *See, e.g., Dole v. United Steelworkers of America,* 494 U.S. 26, 42 (1990) (where statute as a whole clearly expressed Congress'

intention, deference to contrary agency interpretation is improper); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("[i]f the intent of Congress is clear, that is the end of the matter"); *Securities Industry Association v. Board of Governors*, 468 U.S. 137, 142-43 (1984) ("deference is not a device that emasculates the significance of judicial review").

Second, even if this were a proper occasion for giving *Chevron* deference to an agency interpretation, *the HHS has not given the statute the interpretation arrived at by the circuit court.* As the court below conceded, HHS has not issued binding regulations interpreting the spousal impoverishment provisions of the MCCA as mandating an income-first approach. Nor has the HHS informally adopted rules approving such a scheme. Instead, what the lower court sought to "defer" to was a letter written by a member of the regional office of the Health Care Financing Administration (**"HCFA"**), itself a branch of HHS, stating that the agency had not yet taken a position on the meaning of the statute and for the time being, would not contest any interpretation given to the statute by the Respondents.

The letter from the Acting Chief of the Chicago Medicaid Operations Branch of HCFA to which the court improperly accorded deference is entirely inconclusive on the question of whether an income-first approach is proper. Far from requiring such an approach, the letter is actually a retraction of a previous agency letter that had seemed to mandate the income-first interpretation arrived at by the circuit court:

> *The income-first rule is not specified by the statute and as such is a "derived" policy. As a result, the policy should not be considered as binding.* However, because we tried to issue the SMM sections covering spousal impoverishment as quickly as possible, we inadvertently failed to identify this policy as a "derived" policy. . . . We would now like to clarify

> that States have the option to use the income-first rule or to apply some other reasonable interpretation of the law *until we have issued final regulations which specifically address this issue.*

Sixth Circuit Brief of Appellants at A31 (emphasis supplied).

By contrast, this Court in *Chevron* accorded deference to an EPA regulation, formally promulgated pursuant to the notice and comment provisions of the Administrative Procedure Act, which was implemented pursuant to an explicit grant of authority by Congress. More recently in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court unanimously concluded that two agency letters, similar to those relied on here by the circuit court did not constitute evidence of a prior administrative policy to which deference should be accorded:

> [w]e doubt whether either of these statements was sufficient in and of itself to establish a binding agency policy — the former because it was too informal, and the latter because it only purported to represent the position of the Deputy Chief Counsel in response to an inquiry concerning particular banks. Nor can it even be argued that the two statements *reflect* a prior agency policy since, in addition to contradicting the regulation before us here, they also contradict one another.

Id. at 743 (emphasis in original). This is entirely consistent with the Court's statement earlier in *Smiley* that "*we deny deference* 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.' " *Id.* at 741, *citing Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988) (emphasis supplied). *See also Rowan Cos. v. United States*, 432 U.S. 247, 253 (1981) (Treasury regulation promulgated under general authority to prescribe needful rules and regulations owed "less deference than a regulation issued under a specific grant of

authority to define a statutory term or to prescribe a method of executing a statutory provision.")

In this instance the HHS has not even taken a litigating position supporting the respondents, let alone adopted a rule or regulation that vindicates him. The most that can be said is that a regional office of the HHS has temporarily acquiesced in the use of an "income-first" approach, but has stated that this approach "is not specified by the statute." This does not even approach an authoritative administrative interpretation made under a specific grant of authority to which the circuit court may give deference under *Chevron*.

4. The Respondents are barred by principles of collateral estoppel from relitigating the issue of the proper interpretation of 42 U.S.C. § 1396r-5(e)(2)(C) because they had a full and fair opportunity to litigate the identical issue in two previous state court proceedings and have obtained decisions rejecting their interpretation both times.

The Respondents' appeal of the district court's interpretation of 42 U.S.C. § 1396r-5(e)(2)(C) is barred under the doctrine of collateral estoppel. The district court's July 13, 1995, order rejecting the Respondents' interpretation of the spousal impoverishment provisions of the MCCA mirrored and relied on unfavorable rulings that the Respondents had previously received in cases in which two Ohio appellate courts had flatly rejected legal arguments identical to those advanced here. *See Kimnach v. Ohio Department of Human Services*, 645 N.E. 2d 825 (10th Dist. Ct. App. 1994), *discretionary appeal not allowed*, 644 N.E. 2d 409 (Oh. 1995); *Gruber v. Ohio Department of Human Services*, 647 N.E. 2d 861 (5th Dist. Ct. App. 1995), *discretionary appeal not allowed*, 646 N.E. 2d 468 (Oh. 1995). The plaintiffs in the *Kimnach* and *Gruber* cases, in addition to being represented by the same counsel who are litigating this case, initially were members of the plaintiff class certified by the district court on March 31, 1995.

Because the Respondents have fully and fairly litigated the question of what is the proper interpretation of the MCCA — twice, so far — the doctrine of collateral estoppel prevents them from revisiting the issue yet again, hoping to obtain a different result. It is well established that a state court judgment is to be given the same preclusive effect in a subsequent federal action as it would be given by the courts of the state from which the judgment emerged. *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Under Ohio law, the previous judgments would preclude the Respondents from relitigating the issue of how 42 U.S.C. § 1396r-5(e)(2)(C) should be interpreted. *See Trautwein v. Sorgenfrei*, 391 N.E. 2d 326, 331 (1979).

Moreover, even though there arguably was not absolute mutuality of parties in *Kimnach* and *Gruber* and the instant case (the nominal plaintiffs were different), the Ohio Supreme Court has recognized an exception to the general requirement of mutuality that is applicable to the facts of this case:

> [W]here it [is] shown that the party defendant clearly had his day in court on the specific issue brought into litigation within the later proceeding, the non-party plaintiff c[an] rely upon the doctrine of collateral estoppel to preclude the relitigation of that specific issue. We believe this exception to the principle of mutuality to be a proper one.

Goodson v. McDonough Power Equipment, Inc., 443 N.E. 2d 978, 985 (Oh. 1983). The court in *Goodson* reasoned that although mutuality of estoppel is usually necessary in order for a plaintiff to use claim preclusion offensively (at least where issues of design negligence are involved), 443 N.E. 2d at 984-87, the "day in court" exception to mutuality is proper. *See also Hicks v. De La Cruz*, 369 N.E. 2d 776 (Oh. 1977) (collateral estoppel precluded defendants from relitigating issue of state governmental immunity that it had litigated previously against different plaintiffs). Thus,

in Ohio collateral estoppel would bar the Respondents claims that were relitigated in the court of appeals.

In light of the foregoing, Respondents cannot and should not be permitted to evade application of the doctrine of collateral estoppel. They are precluded from litigating for the third time the identical issue of whether their interpretation of the MCCA is correct.

5. The issue presented is national in scope, vital in nature, and likely to arise again.

At the outset, the circuit court's decision immediately affects the Medicaid policies utilized in the states covered by the Sixth Circuit, Ohio, Michigan, Kentucky, and Tennessee, none of which currently have an income-first interpretation of the MCCA. Although Ohio in 1996 adopted a resource-first method of implementing the statute, this was done only in response to the petitioners' successful action in the district court which has now been reversed. Thus, unless certiorari is granted, Ohio will be free to implement the income-first reading of the MCCA that it has sought to vindicate, as will the other states in the circuit.

Moreover, although financial ramifications alone are not sufficient to make this case appropriate for certiorari, it is significant that Ohio's failure to employ a resource first revision of the CRSA from 1990 until September of 1994 withheld from seniors, by the state's own estimates, between three hundred million to one billion dollars in Medicaid benefits. 145 F.3d at 796. If petitioners are indeed correct that the income-first approach is contrary to Congress's intentions regarding spousal impoverishment, this constitutes frustration on a staggering scale of a key Congressional policy choice. Nationally, it is clear that this controversy is tremendously important to the lives of millions of elderly Americans.

The enduring, national scope of this issue is further underscored by the fact that the spousal impoverishment provision at issue here applies to all states enrolled in the Medicaid program and is unlikely to be changed by Congress anytime soon. Last year it is noteworthy that when Congress revamped much of the welfare program, they did not repeal or revise this portion of the law. 42 U.S.C. § 1396r-5 (West Supp. 1998). In addition, many states such as Ohio and New York have modeled their state administrative laws on the precise language employed by 42 U.S.C. § 1396r-5, making certainty as to its meaning even more important.

The necessity of resolving the meaning of this provision is perhaps most apparent when one considers the sharply contradictory rulings from a variety of courts that have arisen concerning the proper interpretation of 42 U.S.C. § 1396r-5. In addition to the diametrically opposed rulings of the circuit court and the district court in the instant case, courts all over the country have been divided on the question of whether an income-first rule is permitted under the statute. *Compare Kimnach v. Ohio Department of Human Services*, 645 N.E. 2d 825 (10th Dist. Ct. App. 1994) (income first rule not permitted by statute), *discretionary appeal not allowed*, 644 N.E. 2d 409 (Oh. 1995) *and Gruber v. Ohio Department of Human Services*, 647 N.E. 2d 861 (5th Dist. Ct. App. 1995), (income first rule not permitted by statute), *discretionary appeal not allowed*, 646 N.E. 2d 468 (Oh. 1995) *with Cleary v. Waldman*, 959 F.Supp. 222 (D.N.J. 1997) (income first rule permissible interpretation of statute) *and Golf v. Department of Social Services*, 1998 W.L. 151293 (N.Y. Ct. App. 1998) (reversing trial court ruling that income first rule is not permitted by statute). As one court has observed, the question presented is a difficult one "which ultimately will have to be decided at the appellate level." *Cleary v. Waldman*, 959 F. Supp. 222, 232 (D.N.J. 1997). Such pervasive uncertainty on a matter of national importance can and should be eliminated by this Court.

Of course, the entirety of this petition is predicated on the assumption that the Sixth Circuit erred. But even if one assumes that the circuit court was right in its interpretation, there is no reason to delay in positively answering this vital question of statutory intent. No other circuit court in the country has definitively interpreted the spousal impoverishment provisions of the MCCA and endorsed an income-first approach to calculating Medicaid eligibility. Moreover, the United States Department of HHS still has not been able to arrive at a definitive policy as to the meaning of 42 U.S.C. § 1396r-5, a statute whose significance will only become greater as America's elderly population increases. Thus, Medicaid applicants, Congress, and state and federal administrators alike would benefit from immediate review of the circuit court's decision by this Court.

CONCLUSION

The circuit court's decision conflicts with other judicial decisions interpreting 42 U.S.C. § 1396r-5, improperly expands the precedents of this Court, and creates uncertainty in a profoundly important area of federal law. For these reasons, the petitioners respectfully request the Court to grant the writ.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 27, 1998

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT CHAMBERS, et al.,
Plaintiffs-Appellees,

v.

OHIO DEPARTMENT OF HUMAN SERVICES, et al.,
Defendants-Appellants.

No. 96-3046

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 94-01094--Joseph P. Kinneary, District Judge.

Argued: May 2, 1997

Decided and Filed: May 27, 1998

Before: WELLFORD, MOORE, and COLE, Circuit Judges.

Appendix A

COUNSEL

ARGUED: Jeffrey S. Sutton, STATE SOLICITOR, Columbus, Ohio, for Appellants. Dennis L. Pergram, MARTIN, PERGRAM & BROWNING, Worthington, Ohio, for Appellees. **ON BRIEF:** Jeffrey S. Sutton, STATE SOLICITOR, Columbus, Ohio, Karen L. Lazorishak, James M. McGovern, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellants. Dennis L. Pergram, MARTIN, PERGRAM & BROWNING, Worthington, Ohio, Clay P. Graham, GRAHAM, McCLELLAND, McCANN & RANSBOTTOM, Zanesville, Ohio, for Appellees. Douglas A. Baker, BAKER, BAKER & SWETERLITSCH, Columbus, Ohio, Geoffrey E. Webster, Columbus, Ohio, Charles A. Miller, COVINGTON & BURLING, Washington, D.C., Carol Rolf, ROTH, ROLF & GOFFMAN, Cleveland, Ohio, for Amici Curiae.

OPINION

R. GUY COLE, JR., Circuit Judge. Defendant-Appellant Arnold Tompkins, Director of the Ohio Department of Human Services (ODHS), appeals the district court's grant of partial summary judgment and injunctive relief in favor of class-action plaintiffs-appellees, in which the district court ordered ODHS to change its Medicaid eligibility policy and provide notice to class members regarding eligibility for Medicaid benefits. For the reasons that follow, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

Appendix A

I.

Robert Chambers and his wife Jean Chambers, along with Lauren Holland and his wife Sarah Holland (collectively, "appellees"), filed this class action in the Court of Common Pleas, Franklin County, Ohio, on behalf of themselves and others similarly situated, against ODHS and its director, Arnold Tompkins, in his official capacity. ODHS is the state administrative agency responsible for implementing the federal statute at issue in this case, the Medicare Catastrophic Coverage Act of 1988, 42 U.S.C. § 1396r-5 (MCCA). The class-action complaint alleged that ODHS misinterpreted and misapplied certain provisions of the MCCA in determining eligibility for Medicaid benefits. More specifically, appellees contended that ODHS improperly determined Medicaid eligibility by applying an "income-first" rule as opposed to a "resource-first" rule for the transfer of assets between spouses when one spouse is institutionalized in a nursing home.

Whether ODHS utilizes the income-first rule or the resource-first rule is critical in the determination of Medicaid eligibility. Under an income-first approach, a nursing home resident must transfer income before he or she may transfer resources — or assets — to the noninstitutionalized or "community" spouse, if it is determined under the formula provided by the MCCA that the community spouse is entitled to additional monies for support. Because the institutionalized spouse first transfers his or her income to the community spouse under the income-first rule, it is less likely that the institutionalized spouse will be able to transfer resources to the community spouse, leaving the institutionalized spouse with a greater amount of resources in his or her own name. An institutionalized spouse possessing resources in excess of $1500 is ineligible for Medicaid benefits. Thus, the income-first rule renders an institutionalized spouse less likely to qualify for Medicaid assistance and obligated to pay nursing home and other medical expenses with his or her own assets. In applying the

MCCA, ODHS opted to use the income-first rule in Ohio from approximately 1990 until January 1996.

In addition to arguing that ODHS improperly interpreted the MCCA by applying the income-first rule, appellees further claimed that ODHS failed to meet Medicaid obligations to notify applicants and their spouses of the procedures and requirements for obtaining Medicaid benefits.

ODHS removed the case to the district court and, in addition, sought dismissal or summary judgment; appellees filed a motion for partial summary judgment. On March 31, 1995, the district court certified plaintiffs as a class,[1] and on July 13, 1995, ruled on the various motions before it ("July Order"). In its July Order, the district court dismissed ODHS on the basis of Eleventh Amendment immunity, but permitted Tompkins to remain as a defendant.[2] In addition, the district court granted appellees' motion for partial summary judgment, concluding that the "plain meaning" of the relevant provisions of the MCCA mandated a resource-first approach in determining a nursing home resident's eligibility for Medicaid benefits; thus, ODHS misapplied the statute by using the income-first rule. Finally, the district court determined that the Medicaid application forms used by ODHS did not properly notify applicants of the methods used by ODHS to compute eligibility for benefits. The district court therefore required ODHS to submit to the court a proposed notice to Medicaid applicants that informs them of their rights under the MCCA.

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[1]The parties stipulated that the class consists of "[a]ll individuals in the State of Ohio who from January 1990 are, were, or in the future would be" eligible for Medicaid coverage and who were in marriages in which one spouse was institutionalized while the other continued to live in the community.

[2]For convenience, we will continue to refer to appellant as "ODHS."

Thereafter, ODHS submitted to the court proposed revisions of its rules regarding methods to compute eligibility, as well as proposed revised Medicaid application forms, in order to conform with the district court's ruling. ODHS further issued proposed new administrative rules indicating that a resource-first approach, as ordered by the district court, would be used in Ohio effective January 1, 1996. Appellees contested ODHS's proposed revisions, however, arguing that the revisions were inadequate under federal law and failed to comply fully with the court's order. In October 1995, appellees filed several motions for further relief, seeking an order compelling ODHS to include language in its application forms for Medicaid benefits that specifically set forth the resource-first rule and an order compelling ODHS to identify and notify the class of the court's July Order. On December 14, 1995, the district court granted appellees' motions and issued an injunction ("December Injunction") requiring ODHS to identify and notify the following classes of individuals of their potential eligibility for Medicaid benefits and to inform them that state law may provide a remedy for any past erroneous denials of eligibility or benefits:

(1) Nursing home residents and their spouses who have applied for Medicaid benefits but are not presently receiving benefits because their application was denied due to excess resources;

(2) Nursing home residents and their spouses who have received a resource assessment but who have not applied for Medicaid benefits;

(3) Nursing home residents and their spouses who are presently receiving Medicaid benefits but were denied benefits previously due to excess resources;

(4) Nursing home residents and their spouses who are presently receiving Medicaid benefits but did not apply for Medicaid until after the nursing home resident spent his/her resources down to $1,500; and

(5) Nursing home residents and their spouses who have not applied for Medicaid benefits or requested a resource assessment.

ODHS contends that the notice required by the injunction will incur costs in excess of two million dollars, while processing the resulting claims will incur costs ranging from three hundred million to one billion dollars.

On January 5, 1996, ODHS filed in the district court an emergency motion for a partial stay of the court's December Injunction and also filed a notice of appeal to this court with respect to the July Order and the December Injunction.[3] The district court denied ODHS's request for a stay; however, upon ODHS's motion to this court, we granted a stay of the district court's December Injunction pending this appeal.

II.

At the outset, we must consider the scope of our jurisdiction in this matter. Appellees argue that we do not have jurisdiction to consider the district court's July Order because ODHS failed to file a timely notice of interlocutory appeal. Appellees thus claim that ODHS waived interlocutory appeal of the issue decided by the July Order: whether the MCCA mandates a resource-first approach. Appellees argue that our consideration is jurisdictionally limited to the order from which ODHS filed a notice of appeal, that is, the December Injunction which ordered ODHS to provide notice of the July Order to the class. Appellees thus contend that we are without jurisdiction to consider the district court's determination that the MCCA mandates a resource-first approach. We disagree.

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[3] Appellants' notice of appeal also included the district court's March 31, 1995 order in which the district court certified the class; however, appellants present no argument regarding class certification. Moreover, appellants stipulated to the certification of the class. Accordingly, we do not address the district court's March 31, 1995 order.

Appellees do not dispute our jurisdiction to consider ODHS's timely appeal from the district court's December 14, 1995 interlocutory order; because the district court issued an injunction at that time, the order was immediately appealable pursuant to 28 U.S.C. § 1292(a)(1).[4] Appellees contend that the July 13, 1995 interlocutory order, although not technically termed an injunction, had the effect of an injunction because it required ODHS to revise its rules and application forms. Appellees thus claim that because the July Order was an injunction, that order was immediately appealable and ODHS waived its right to appeal by failing to file a timely notice of appeal. Even if we assume that the July Order was an injunction, we must consider whether ODHS waived interlocutory appeal of that order.

It is clear that parties are not required to file an interlocutory appeal; rather, a party may forgo an interlocutory appeal and present the issue to this court after final judgment. *See Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 608 (7th Cir. 1993); 11A Wright & Miller, Federal Practice and Procedure § 2962 (1973 & Supp. 1997) (stating that § 1292(a)(1) "merely permits interlocutory appeal; a party does not waive any rights [of appeal of interlocutory orders at the time of final judgment] by failing to seek immediate review"); *see also F.W. Kerr Chem. Co. v. Crandall Assoc., Inc.*, 815 F.2d 426, 428-29 (6th Cir. 1987) (failure to appeal from a preliminary injunction order does not constitute a waiver of those issues in appeal from final judgment; however, "such a failure to appeal would logically preclude a subsequent interlocutory appeal under § 1292(a)(1) from an unwarranted successive motion").[5] Thus, ODHS did

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[4] 28 U.S.C. § 1292(a)(1) provides in part that "the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting . . . injunctions."

[5] In *Kerr*, we held that we did not have jurisdiction to consider an appeal from a district court's order denying plaintiff's third motion for preliminary injunction that was based on facts that were unchanged from

not "waive" review upon final judgment of the July Order by failing to file an appeal at that time. Nevertheless, because this case has not yet come to final judgment, we must determine whether there now exists a jurisdictional basis for interlocutory appeal.

The doctrine of pendent appellate jurisdiction allows an appellate court, in its discretion, to exercise jurisdiction over issues that are not independently appealable when those issues are "inextricably intertwined" with matters over which the appellate court properly and independently has jurisdiction. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995); *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1025, 1028 (10th Cir. 1998); *Brennan v. Township of Northville*, 78 F.3d 1152, 1157-58 (6th Cir. 1996). In *Brennan*, we exercised pendent appellate jurisdiction with respect to the issue of liability in our determination regarding qualified immunity. *Id.; but see Williams v. Kentucky*, 24 F.3d 1526, 1542 (6th Cir. 1994) (declining to exercise pendent appellate jurisdiction to consider underlying merits of constitutional claim when reviewing issue of qualified immunity). A pendent appellate claim can be regarded as "inextricably intertwined" with a properly reviewable claim only if the pendent claim "is coterminous with, or subsumed in, the claim before the court on interlocutory appeal." *Law*, 134 F.3d at 1028 (citation omitted). The "inextricably intertwined" requirement of pendent appellate jurisdiction is not meant to be loosely applied as a matter of discretion; rather, such jurisdiction only may be exercised when the appealable issue at hand cannot be resolved without

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the time of the second motion. Despite *Kerr's* disallowance of a late appeal from an interlocutory order, we do not believe that *Kerr* mandates a blanket restriction of this court's review of interlocutory appeals that could have been filed at an earlier instance. Instead, *Kerr* restricts an interlocutory appeal when a party successively asks for the same relief based on the same facts, then files an appeal that should have been filed at the time of the first decision. That situation is distinguishable from the present case.

addressing the nonappealable collateral issue. *See Archie v. Lanier*, 95 F.3d 438, 443 (6th Cir. 1996).

In the present case, the district court determined that the MCCA mandates a resource-first approach in its July Order. In its December Injunction, the district court ordered ODHS to provide notice to the class of its July Order. Despite the fact that notice to the class is a distinct issue from the issue of whether the MCCA mandates a resource-first approach, we believe that the issues determined in the July Order are "inextricably intertwined" with the notice requirements set forth in the December Injunction. Put differently, we cannot determine the appropriateness of ODHS's notice if we have not yet had an opportunity to review the issues that dictate the content of that notice. Our consideration of the notice ordered by the district court depends upon the underlying merits of the issues giving rise to the notice requirement. As the district court stated in its December Injunction, "[T]his Court can order the notices be sent out as 'necessary or proper relief based on a declaratory judgment,' which is the Court's July 13, 1995 Order in favor of plaintiffs." It simply does not make sense to review the propriety of the required notice at this time, and wait until final judgment to review the underlying merits of this case. If we have not yet had the opportunity to determine whether the MCCA mandates a resource-first approach, we cannot give meaningful review to the issue of the notice that is required.

With the foregoing in mind, we believe that this case is especially appropriate for the exercise of pendent appellate jurisdiction. The interpretation of the relevant provisions of the MCCA is "inextricably intertwined" with the notice that must be provided to individuals affected by the statute. Accordingly, we exercise our discretion to review the July Order under the doctrine of pendent appellate jurisdiction in

connection with our review of the district court's December Injunction.[6]

III.

Turning to the pivotal issue of this case — whether the MCCA mandates a resource-first approach in determining a nursing home resident's eligibility for Medicaid benefits — we begin with an overview of the Medicaid statutory scheme. Medicaid, enacted in 1965 as Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., is a cooperative federal-state program that was established to enable the states to provide medical services to those who cannot afford such services. For states that participate in the program, such as Ohio, the federal government provides partial funding and establishes mandatory and optional categories of eligibility and services covered. The Secretary of the United States Department of Health and Human Services, through the Health Care Financing Administration, administers the program at the federal level, while ODHS administers the program at the state level with the assistance of Ohio's county departments of human services. The Medicaid laws set various limits on an individual's income and resources (the term used for assets) for purposes of eligibility.

In 1988, Congress enacted the Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396r-5 (MCCA). The objective of the MCCA was to protect married couples when one spouse is institutionalized in a nursing home, so that the spouse who continues to reside in the community is not impoverished and has sufficient income and resources to live independently. *See* H.R. Rep. No. 100-105(II), 100th Cong., 2d Sess. at 65 (1988), *reprinted in* 1988 U.S.C.C.A.N. 857, 888. Prior to 1988, Medicaid eligibility rules required

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[6] Regardless of whether the July Order was itself an injunction or simply a grant of partial summary judgment, the doctrine of pendent appellate jurisdiction brings those issues, which are inextricably intertwined with the issues determined by the December Injunction, before us.

couples to deplete their combined resources before the institutionalized spouse was eligible for benefits, often leaving the community spouse financially vulnerable. The MCCA attempted to strike a balance between preventing impoverishment of the community spouse by excluding minimum amounts of resources and income for that spouse from eligibility considerations, and preventing a financially solvent institutionalized spouse from receiving Medicaid benefits by ensuring that income was not completely transferred to the community spouse.

The MCCA governs the calculation and transfer of both income and resources of the community spouse and the institutionalized spouse for purposes of Medicaid eligibility. The issue in this case involves the approach used to supplement the amount of resources attributed to the community spouse, when his or her income is inadequate under the MCCA. The statutory provision for revising the community spouse resource allowance is set out in 42 U.S.C. § 1396r-5(e)(2)(C). Before that subsection is addressed, however, it is necessary to discuss the subsections of the statute that deal with income and resources.

Subsections (b) and (d) of § 1396r-5 provide the rules for the treatment of income. Essentially, subsection (b) incorporates the "name on the check" principle, whereby income is considered available only to the spouse in whose name payment is made. *See* 42 U.S.C. § 1396r-5(b). Income paid in the name of both spouses is equally divided between them. *See* 42 U.S.C. § 1396r-5(b)(2). Under these rules, the community spouse's income is not considered in determining the eligibility of the institutionalized spouse. *See* 42 U.S.C. § 1396r-5(b)(1).

Once eligibility is established, subsection (d) provides for certain allowances that may be deducted from the institutionalized spouse's income that must be applied to the payment of medical costs. Subsection (d)(3) provides for the computation of the community spouse's monthly minimum

maintenance needs allowance (MMMNA). This is an amount that ensures that the community spouse has income significantly above the poverty level.[7] Subsection (d)(2) defines the community spouse's monthly income allowance as the amount by which the MMMNA exceeds the monthly income otherwise available to the community spouse. The community spouse's monthly income allowance is an amount that is allowed to be deducted from the institutionalized spouse's income. *See* 42 U.S.C. § 1396r-5(d)(1).

In addition to income, the total value of the couple's resources must be calculated and a share allocated to each spouse.[8] *See* 42 U.S.C. § 1396r-5(c)(1). For purposes of eligibility, the amount allocated to the community spouse is called the community spouse resource allowance.[9] *See* 42 U.S.C. § 1396r-5(c)(2)(B). The resources available to the institutionalized spouse must not exceed a prescribed limit; otherwise, the institutionalized spouse must "spend down" —

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[7] The MMMNA is 150% of the federal poverty level for a couple, plus certain shelter expenses in excess of 30% of that figure. 42 U.S.C. § 1396r-5(d)(3), (4).

[8] "Resources" do not include the marital home, household goods, personal belongings, the value of a burial space, and a limited amount for the value of an automobile and funds for burial expenses. 42 U.S.C. § 1396r-5(c)(5).

[9] The amount of the community spouse resource allowance is the greatest of

(a) $ 12,000 (adjusted annually),
(b) the lesser of one-half total joint resources or $60,000 (adjusted annually),
(c) an amount established pursuant to a fair hearing under subsection (e)(2); or
(d) an amount transferred under court order.

See 42 U.S.C. § 1396r-5(f)(2)(A).

or deplete those assets to the statutory maximum — in order to become eligible for benefits.

If either spouse is dissatisfied with the determination of the community spouse resource allowance, that spouse may request a hearing. *See* 42 U.S.C. § 1396r-5(e). At the hearing, the state must ascertain the MMMNA of the community spouse. If the community spouse's MMMNA is not met, the hearing officer must revise the community spouse resource allocation to provide the community spouse with enough income-generating assets to meet the MMMNA. *See* 42 U.S.C. § 1396r-5 (e)(2)(C). This subsection is the critical provision that is the crux of the dispute in this appeal. Subsection (e)(2)(C) provides as follows:

> Revision of community spouse resource allowance. If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's **income** to the monthly minimum maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(e)(2)(c) (emphasis added).[10] This provision does not specify what is included in the term "income."

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[10] Ohio's implementation of subsection (e)(2)(C) provided as follows:

> If either the [institutionalized spouse] or the [community spouse] can document that the [community spouse] resource allowance (in relation to the amount of income generated by it) is inadequate to raise the [community spouse's] income to the MMMNA, a hearing decision may substitute a higher resource allowance to provide additional income as necessary.

Ohio Admin. Code § 5101: 6-7-02 (A)(4).

In summary, when an institutionalized spouse applies for Medicaid benefits, a county agency performs a resource assessment and calculation of the community spouse resource allowance, which represents the amount of resources allocated to the community spouse. At this point in time, the local agency determines whether the institutionalized spouse has countable resources attributed to him or her in excess of $1,500; if so, the agency notifies the couple of its calculation and determination that the institutionalized spouse is ineligible for Medicaid until the institutionalized spouse's resources are "spent down" to $1500. If either spouse disputes these calculations, that spouse can request a revision of the community spouse resource allowance at a hearing pursuant to 42 U.S.C. § 1396r-5(e)(2)(C). Ohio's implementation of this section — in particular, what is included in the term "income" — is the subject of dispute in the present case.

IV.

In applying 42 U.S.C. § 1396r-5(e)(2)(C), the issue presented by this appeal is whether a community spouse's "income" includes — or does not include — any transfer of income from the institutionalized spouse. Whether this transferred income is included distinguishes the two possible approaches used to implement subsection (e)(2)(C). These two approaches, as mentioned before, are known as the income-first approach and the resource-first approach.

Under an income-first approach, an institutionalized spouse's income is transferred to the community spouse prior to the transfer of resources, if necessary to raise the community spouse's income to the MMMNA. Thus, the transfer of income takes place prior to any revision of the community spouse resource allowance. Stated otherwise, the income-first approach includes any income transferred from the institutionalized spouse to the community spouse in determining the community spouse's income under subsection (e)(2)(C). The resource-first approach, on the

other hand, requires a transfer of resources from the institutionalized spouse to meet the MMMNA, without regard to the institutionalized spouse's income. The resource-first approach therefore does not include transferred income from the institutionalized spouse as part of the community spouse's income under subsection (e)(2)(C).

The United States Department of Health and Human Services (HHS) has not, to date, issued federal regulations concerning the implementation of § 1396r-5(e)(2)(C), or determined whether the income-first or resource-first approach should be used. However, in December 1993, HHS issued a regional opinion letter indicating that states were compelled to adopt an income-first approach. *See* Health Care Financing Administration (HCFA), Medicaid Operations Branch, Chicago Regional State Letter No. 51-93 (December 1993). However, in July 1994, HHS issued a second opinion letter, clarifying that the statute did not mandate an income-first approach and that states have the option to use that approach or "to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue." HCFA, Medicaid Operations Branch, Chicago Regional State Letter No. 22-94 at 2 (July 1994).

In Ohio, ODHS, until January 1996, opted to use an income-first approach rather than a resource-first approach.[11] In other words, when a community spouse's income was less than the statutory MMMNA, ODHS required that the institutionalized spouse first transfer any available income to the community spouse to satisfy the MMMNA. ODHS permitted the transfer of resources from the institutionalized spouse to the community spouse only when the income of the community spouse, plus the income of the institutionalized

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[11] Beginning in 1996, ODHS adopted the resource-first approach instead of the income-first approach. Thus, the issues presented in this case are limited to the time period prior to January 1996, when ODHS applied the income-first rule.

spouse, plus the income generated by the original community spouse resource allowance, did not meet the MMMNA. Under ODHS's income-first interpretation, it was less likely that resources would be transferred to the community spouse, which in turn, left the institutionalized spouse with more available resources and less likely to qualify for Medicaid.[12]

V.

A.

In the present case, the district court considered whether it was appropriate for ODHS to apply the income-first approach. The district court concluded that it was not, finding that the MCCA mandates a resource-first approach. Accordingly, the district court granted summary judgment in favor of appellees as to this issue. We review a district

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[12] Appellants set forth an illustration that is helpful in distinguishing an income-first approach from a resource-first approach. One of the named claimants, Mr. Lauren Holland, entered a nursing home and applied for Medicaid. At the time of application, Mr. and Mrs. Holland had joint, non-exempt resources in the amount of $169,655. For purposes of determining eligibility, ODHS allocated $72,660 of this total to Mrs. Holland as her community spouse resource allowance; thus, Mr. Holland retained $97,000. ODHS further determined that Mrs. Holland's MMMNA was $1230. Mrs. Holland's social security income was $417 per month, and Mr. Holland's social security income was $857 per month.

Using the income-first approach, ODHS determined that Mrs. Holland's MMMNA could be satisfied by transferring Mr. Holland's monthly income to her and thus there was no need to increase her community spouse resource allowance. As a result, Mr. Holland could not transfer resources to Mrs. Holland. Mr. Holland was therefore ineligible for Medicaid, because his resources of $97,000 exceeded the $1500 resource limitation. Under a resource-first approach, on the other hand, Mr. Holland could immediately transfer resources to Mrs. Holland to increase the community spouse resource allocation to whatever amount would generate an additional $813 per month (the difference between $1230 and $417). Even assuming a relatively liberal rate of return, Mr. Holland could most likely transfer the entire $97,000 to Mrs. Holland, which would render him immediately eligible for Medicaid.

court's grant of summary judgment, which was premised on a question of statutory construction, de novo.[13] *See First City Bank v. National Credit Union Admin. Bd.*, 111 F.3d 433, 436-37 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1162 (1998).

In finding that the MCCA mandates a resource-first approach, the district court adopted the reasoning of two Ohio appellate courts which had addressed this issue and determined that ODHS's use of the income-first approach did not comply with the "plain language" of 42 U.S.C. § 1396r-5. *See Gruber v. Ohio Dep't of Human Servs.*, 647 N.E.2d 861 (Ohio App. 1994); *Kimnach v. Ohio Dep't of Human Servs.*, 645 N.E.2d 825 (Ohio App. 1994).[14] Because of its reliance

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[13] Regardless of whether we consider the district court's July Order as a partial grant of summary judgment or as an injunction, our review of the district court's construction of the MCCA is de novo. *See GTE Mobilnet v. Johnson*, 111 F.3d 469, 474-75 (6th Cir. 1997) ("We review de novo questions of law relevant to a district court's grant of a preliminary injunction.")

[14] Appellees argue that the doctrine of issue preclusion bars our consideration of the matters raised in this appeal, because of the two prior judgments by the Ohio appellate courts. We recognize that we are required to give the same effect to a state court judgment that would be given by a court of the state in which the judgment was rendered. *See Hapgood v. City of Warren*, 127 F.3d 490, 493 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1361 (1998). In Ohio, the general rule is that mutuality of parties is a prerequisite to the offensive use of issue preclusion. *See Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978 (Ohio 1983). Because the parties in the present action are not identical nor in privity with the parties in the prior actions, issue preclusion does not apply here.

In addition, the Supreme Court has held that non-mutual issue preclusion is generally not available against the federal government. *See United States v. Mendoza*, 464 U.S. 154, 158 (1984). In *Mendoza*, the Court rationalized that allowing non-mutual issue preclusion against the United States would force the Solicitor General to "abandon those prudential concerns and to appeal every decision in order to avoid foreclosing further review." *Id.* at 161. Also, if non-mutual issue preclusion applied against the United States, the government's ability to

on the plain language of the statute, the district court concluded that it was not required to give deference to ODHS's — or for that matter, HHS's — interpretation of the MCCA. We disagree.

The district court based its decision on what it called a plain reading of the sections of the MCCA dealing with the transfer of resources and the transfer of income. The district court noted that subsection (f) of § 1396r-5 specifically permits the transfer of resources in the form of the community spouse resource allowance. This subsection requires that the transfer of resources occur as soon as practicable after eligibility is determined, but does not prohibit ascertaining the amount of the community spouse resource allowance prior to the eligibility determination.[15] The district court compared this

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develop law by litigating the same issue in several circuits would be inhibited, as well as the Court's practice of waiting for "percolation" through the circuits before granting certiorari. *See id.* at 160.

Although the *Mendoza* rationale has not been definitively extended to apply to state governments, there is support for that proposition. *See Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558, 1579 (11th Cir. 1985) (applying *Mendoza* to state governments); *see also Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 205 (D.C. Cir. 1996) (Silberman, J.), *cert. denied*, 117 S. Ct. 1468 (1997). The same considerations set forth in *Mendoza* with respect to the federal government may apply to state governments. The *Mendoza* rationale provides further support for our conclusion that the use of offensive non-mutual issue preclusion is not appropriate *in this case*. While Ohio law is silent in this respect, given its restrictive views on mutuality, we anticipate that the Ohio Supreme Court would not use offensive non-mutual issue preclusion against the state.

[15] 42 U.S.C. § 1396r-5(f) states in part:

> Permitting transfer of resources to community spouse.
>
> (1) In general.
>
> An institutionalized spouse may . . . transfer an amount equal to the community spouse resource allowance. . .. The transfer under the preceding sentence shall be made as soon as practicable after

subsection to subsections (b) and (d) of § 1396r-5, which address the transfer of income between spouses. The district court noted that the provisions dealing with the transfer of income are addressed in entirely different subsections from subsection (f). Further, subsections (b) and (d) refer to the transfer of income after the eligibility determination.[16] The district court thus concluded that there is no provision in the statute that permits the transfer of income to the community spouse prior to the eligibility determination, however, the community spouse resource allowance is determined prior to the eligibility determination. Thus, because income cannot be transferred prior to the eligibility determination, the plain meaning of the statute mandates a transfer of resources from the institutionalized spouse to the community spouse when necessary to supplement the community spouse resource allowance.

We disagree with the district court's conclusion that the MCCA mandates a resource-first approach because there is no express provision for the pre-eligibility transfer of income. First, the MCCA does not prohibit the pre-eligibility transfer of income from the institutionalized spouse to the community

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the date of the initial determination of eligibility.

. . .

[16] 42 U.S.C. § 1396r-5(b)(2) provides in part:

> In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d) . . . the following rules apply. . . .

42 U.S.C. § 1396r-5(d)(1) provides in part:

> After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts . . . .

spouse.[17] Subsections (b) and (d), although not setting forth conditions for the transfer of income prior to the eligibility determination, do not expressly prohibit such a transfer. The better reading of subsections (b) and (d) is that these subsections provide a framework for preserving income for the community spouse by limiting the amount of the eligible institutionalized spouse's income which must be used to pay medical expenses. *See Thomas v. Commissioner*, 682 N.E.2d 874, 879 (Mass. 1997) (holding that Massachusetts' income-first approach was a valid interpretation of § 1396r-5).

Moreover, the purpose of the pre-eligibility determination of the community spouse resource allowance is to prevent the depletion of a couple's joint resources in order for the institutionalized spouse to qualify for Medicaid. *See* H.R. Rep. No. 100-105(II), 100th Cong., 2d Sess. at 65 (1988), *reprinted in* 1988 U.S.C.C.A.N. 857, 888. Because this concern is not relevant on the income side of the equation, the income allowance need not be determined on a pre-eligibility basis. This distinction between the resource allowance and the income allowance does not, however, address — or limit — the issue of whether a transfer of income may be considered when a community spouse resource allowance adjustment is contemplated under § 1396r-5(e)(2)(C).

Second, the attribution of income provisions upon which the district court relied do not, by their very terms, apply to subsection (e)(2)(C). Those income provisions apply "in determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d)." 42 U.S.C. § 1396r-5(b)(2); *see also Cleary v. Waldman*, 959 F. Supp 222, 232 (D.N.J. 1997). Accordingly, subsections (b) and (d)

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[17] Although it is true that § 1396r-5(b)(1) provides that "no income of the community spouse shall be deemed available to the institutionalized spouse," there is no corresponding prohibition of attributing the institutionalized spouse's income to the community spouse.

do not provide guidance for the revision of the community spouse resource allowance pursuant to subsection (e)(2)(C).

In light of the foregoing, we cannot say that § 1396r-5(e)(2)(C) has a "plain meaning" that mandates a resource-first approach. The MCCA does not set out a definition of income as that term is used in subsection (e)(2)(c). Further, unlike the district court, we do not read subsections (b), (d) (e) and (f) as imparting a plain meaning that prohibits the transfer of income pre-eligibility, such that transferred income cannot be included in the community spouse's income as that term is used in subsection (e)(2)(C). Instead, we believe that subsection (e)(2)(C)'s reference to "income" is ambiguous at best. Indeed, the differing views of the various courts and agencies that have interpreted subsection (e)(2)(C) provide a strong indication that the subsection is ambiguous. *Compare, e.g., Gruber*, 647 N.E.2d at 861 (holding that MCCA mandates resource-first approach in implementing subsection (e)(2)(C)), *and Kimnach*, 645 N.E.2d at 825 (same), *with Cleary*, 959 F. Supp. at 232 (holding that income-first approach is permissible interpretation of MCCA), *and Thomas*, 682 N.E.2d at 879 (same); *see also Smiley v. Citibank*, 517 U.S. 735, 116 S. Ct. 1730, 1732-33 (1996) (stating that varying court interpretations indicate that the meaning of a word in a statute is ambiguous).

As stated by the United States Supreme Court, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Likewise, under Ohio law, a state agency's interpretation of a federal statute is given deference so long as the interpretation is reasonable. *See Swallow v. Industrial Comm'n*, 521 N.E.2d 778 (Ohio 1988); *State, ex rel. McLean v. Industrial Comm'n*, 495 N.E.2d 370 (Ohio 1986). Having determined that the MCCA is silent or ambiguous as to the meaning of income in subsection (e)(2)(C), we now turn to whether the interpretations by HHS

and ODHS were permissible and reasonable constructions of the statute.

B.

With respect to interpretation of the MCCA, HHS has acknowledged that the statute does not clearly express whether states are required to follow the resource-first approach or the income-first approach, a view not formalized in regulation but stated in HHS's policy memoranda and in letters. *See, e.g.*, HCFA, Medicaid Operations Branch, Chicago Regional State Letter No. 22-94 (July 1994). Thus, HHS's position is that states have the option "to use the 'income first' rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue." *Id.* at 2. ODHS, the state agency responsible for administration of the MCCA in Ohio, in turn, adopted an income-first approach until January 1996.

Because HHS has not cemented its interpretation in the form of binding regulations, its interpretation may not be "entitled to *de facto* binding effect through judicial deference." *Management Recruiters Int'l, Inc. v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997). However, given the unique nature of the statute and of HHS's power to interpret it, we believe that courts may give even relatively informal interpretations by HHS some presumption of correctness. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) ("Perhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Medicaid] Act."); *see also Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995) (stating that in interpreting the Medicaid statutes, "deference is appropriate here even though the Secretary's interpretation is not contained in a 'legislative rule'"), *cert. denied*, 516 U.S. 1093 (1996).

But even if we give the agency interpretation little deference, because we have concluded that the MCCA is ambiguous as to the issue presented in this case, we must also conclude that the interpretation given it by HHS was a reasonable and permissible interpretation, although not the only possible one. The legislative history of the statute does not indicate the requirement of a single approach to revising the community spouse resource allowance. The initial House bill that became the MCCA did not contain any option for increasing the community spouse resource allowance to meet the monthly needs allowance. *See* H.R. Rep. No. 100-105(II), 100th Cong., 2d Sess. at 70 (1988), *reprinted in* 1988 U.S.C.C.A.N. 857, 893. The initial Senate bill was modeled after the House bill, but added an important change: it excluded from the institutionalized spouse's countable resources those resources necessary to generate enough income to meet the monthly needs allowance of the community spouse, without regard to any income of the institutionalized spouse that might be transferred to the community spouse, or in other words, a resource-first approach. *See* H. R. Conf. Report No. 100-661, 100th Cong., 2d Sess. at 263 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1041. However, the Conference Committee adopted neither the House nor the Senate versions of the bill. *See* H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. at 265 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1035-47. Unlike the House version, the version adopted by the Conference Committee provided for an adjustment to the community spouse resource allowance if necessary to increase the community spouse's income to meet the monthly needs allowance. But, unlike the Senate version, the Conference Committee version did not achieve the result through a reallocation of resources. Instead, it established the administrative hearing process set out in § 1396r-5(e)(2)(C).

The Conference Committee specifically chose not to adopt the resource-first approach as proposed by the Senate. The legislative history thus suggests a congressional intent for the revision of the community spouse resource allocation to take

place either by the application of the income-first rule, or by allowing state agencies discretion to apply their choice of the income-first or the resource-first rule. As previously stated, HHS's position is that Congress has given the states discretion to determine whether to apply the income-first or the resource-first approach. The approach set forth by HHS, and reflected in ODHS's application of the statute, therefore complies with the legislative intent of the MCCA. Further, the policy objectives of the MCCA — to ensure that a community spouse will have an adequate but not excessive amount of available income and resources while the institutionalized spouse is in a nursing home at Medicaid expense — are met by HHS's interpretation.

We believe both the ODHS interpretation of the MCCA and its decision to apply an income-first approach until 1996 were reasonable and permissible. Other courts have endorsed this approach as compatible with the MCCA. *See, e.g., Cleary*, 959 F. Supp. at 232; *Thomas*, 682 N.E.2d at 879. In addition, ODHS's approach has a sound basis in the guiding legislative goals and policy considerations of the MCCA. We therefore **REVERSE** the judgment of the district court, in which the district court found that the MCCA mandates a resource-first approach, and **REMAND** for further proceedings consistent with this opinion.

VI.

In its December 14th injunction, the district court ordered ODHS to notify the five subclasses that were affected by the July Order that they may be eligible for Medicaid benefits and that there may be other relief to which they are entitled under state law. In light of our decision reversing the July Order, there is no need for the notification of the five subclasses; accordingly, we **REVERSE** the district court's December Injunction requiring notice to be sent to the five subclasses.

Appendix A

VII.

For the foregoing reasons, we **REVERSE** the July 13, 1995 and the December 14, 1995 judgments of the district court, and **REMAND** this case to that court for further proceedings consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO FILED DECEMBER 14, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHER DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C-2-94-1094

Judge Kinneary

Magistrate Judge Abel

State of Ohio, ex rel. Robert Chambers, et al.,

Plaintiffs,

v.

Ohio Department of Human Services, et al.,

Defendants.

ORDER

On October 26, 1995, plaintiffs moved for injunctive relief pursuant to 28 U.S.C. §2202 on the grounds that the members of the classes identified in this lawsuit are entitled, under Rule 2 3 (d) (2) Fed. R. Civ. P., to notices of the lawsuit and the Court's July 13, 1995 Order therein. Defendant opposed the motion contending that notice relief cannot be issued unless it is ancillary to injunctive relief. *Quern v. Jordan,* 440 U.S. 332 (1979).

Appendix B

Title 28 U.S.C. §2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Rule 23(d)(2), Fed. R. Civ. P., provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: . . .
>
> (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such a manner as the Court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

Plaintiffs seek to have defendant send notice to five types of individuals who presumably have been affected by the Court's July 13, 1994 Order. These individuals are:

> 1) Nursing home residents and their spouses who have applied for Medicaid benefits but are not presently receiving benefits because their application was denied due to "excess resources;"

2) Nursing home residents and their spouses who have received a resource assessment but who have not applied for Medicaid benefits;

3) Nursing home residents and their spouses who are presently receiving Medicaid benefits but were denied benefits previously due to "excess resources;"

4) Nursing home residents and their spouses who are presently receiving Medicaid benefits but did not apply for Medicaid until after the nursing home resident spent his/her resources down to $1,500; and

5) Nursing home residents and their spouses who have not applied for Medicaid benefits or requested a resource assessment.

The purpose of the five notices is to make the nursing home residents and their spouses aware that (1) they may be eligible for Medicaid benefits and (2) there may be other relief that they are entitled to under state law.

The Court finds that the notices are both necessary and authorized under 28 U.S.C. §2202 and Rule 23(d)(2). As plaintiffs correctly point out, this Court can order the notices be sent out as "necessary or proper relief based on a declaratory judgment," which is the Court's July 13, 1995 Order in favor of plaintiffs. Defendant has conceded that a hearing is not necessary, and the Court can determine as a matter of law whether further relief should be issued.

The Court **HOLDS** that plaintiffs' October 26, 1995 motion for further relief (doc #31) is meritorious; and, therefore it is

GRANTED. The Court **ORDERS** defendant Arnold Tompkins to immediately identify all class members within the five (5) groups of individuals identified in plaintiffs' proposed notices. The Court further **ORDERS** defendant Tompkins to provide plaintiffs the class members so identified along with satisfactory evidence of its accuracy and completeness. The Court further **ORDERS** defendant Arnold Tompkins to mail the proposed notices to the five groups of individuals identified by the notices an soon as those individuals can be identified and, thereafter, file with the Court proof of said mailing.

Plaintiffs also filed a motion for further injunctive relief on October 24, 1995. Plaintiffs seek to enjoin defendant Tompkins from using the notices previously used by the Ohio Department of Human Services. Plaintiffs also seek an order that the various Medicaid applications be changed to contain the following provisions:

> As a general rule, the spouse living in the community (the community spouse) is entitled to keep one-half of the non-exempt resources up to a maximum figure. Some resources may be considered *totally exempt* when determining Medicaid eligibility such as your home, household goods, personal effects, irrevocable burial accounts, and one automobile.
>
> The amount that the community spouse is entitled to keep is called the "community spouse resource allowance." This community spouse resource allowance may, however, be increased if the monthly income from the community spouse resource allowance does not, when combined with the community spouse's other income, total to a figure known as the "minimum monthly maintenance needs allowance."

Appendix B

IN ORDER TO OBTAIN AN INCREASE IN THE COMMUNITY SPOUSE RESOURCE ALLOWANCE, YOU MUST APPLY FOR MEDICAID, AND IF YOU ARE DENIED BECAUSE OF EXCESS RESOURCES, YOU MUST APPEAL BY REQUESTING A FAIR HEARING. AT THE FAIR HEARING, THE HEARING OFFICER SHALL REVISE THE COMMUNITY SPOUSE RESOURCE ALLOWANCE IF YOU OR YOUR SPOUSE ESTABLISHES THAT THE COMMUNITY SPOUSE RESOURCE ALLOWANCE (IN RELATION TO THE AMOUNT OF INCOME GENERATED BY SUCH AN ALLOWANCE) IS INADEQUATE TO RAISE THE COMMUNITY SPOUSE'S INCOME TO THE MINIMUM MONTHLY MAINTENANCE NEEDS ALLOWANCE.

Plaintiffs also seek to have the notice of denial of Medicaid contain the following provisions:

> If your application for assistance has been denied because of excess resources, the law permits you to request a fair hearing in order to revise the community spouse resource allowance which may result in a determination that you no longer have excess resources. The community spouse resource allowance is the amount that the community spouse is entitled to keep. This community spouse resource allowance may, however, be increased if the monthly income from the community spouse resource allowance does not, when combined with the community spouse's

other income, total to a figure known as the minimum monthly maintenance needs allowance.

IN ORDER TO OBTAIN AN INCREASE IN THE COMMUNITY SPOUSE RESOURCE ALLOWANCE, YOU MUST APPEAL BY REQUESTING A FAIR HEARING. AT THE FAIR HEARING, THE HEARING OFFICER SHALL REVISE THE COMMUNITY SPOUSE RESOURCE ALLOWANCE IF YOU OR YOUR SPOUSE ESTABLISHES THAT THE COMMUNITY SPOUSE RESOURCE ALLOWANCE (IN RELATION TO THE AMOUNT OF INCOME GENERATED BY SUCH AN ALLOWANCE) IS INADEQUATE TO RAISE THE COMMUNITY SPOUSE'S INCOME TO THE MINIMUM MONTHLY MAINTENANCE NEEDS ALLOWANCE.

Defendant has revised the administrative rules so that the above language, with one minor exception, is contained in the various forms to be given to Medicaid applicants. Defendant states that the administrative rules will go into effect January 1, 1996. However, the Court concludes that a motion to enjoin defendant Tompkins and order the correction of the forms is warranted. Defendant Tompkins is, of course, already bound by the Court's ongoing and prospective Order of July 13, 1995. Plaintiffs, October 24, 1995 motion for injunctive relief (doc #29) is **GRANTED.**

IT IS SO ORDERED.

s/ Joseph Kinneary
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO FILED JULY 13, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C-2-94-1094

Judge Kinneary

Magistrate Judge Abel

State of Ohio ex rel. Robert Chambers, et al.,

Plaintiffs

v.

Ohio Department of Human Services, et al.,

Defendants

ORDER

Plaintiffs bring this class action against the Ohio Department of Human Services ("ODHS") and its Director, Arnold Tompkins, alleging that defendants have misinterpreted and misapplied provisions of the Medicare Catastrophic Coverage Act of 1988 ("MCCA") and have failed to provide sufficient notice to plaintiffs of the requirements and procedures for establishing Medicaid eligibility. Plaintiffs filed their action in the Court of Common Pleas for Franklin County, Ohio. Defendants removed it to this Court pursuant to 28 U.S.C.

Appendix C

§§1441 and 1446. This matter is before the Court on defendants' December 2, 1994 motion to dismiss, or in the alternative, for summary judgment. Also before the Court is plaintiffs' April 10, 1995 motion for partial summary judgment.

Stipulations of Fact

The following facts have been stipulated to by the parties. The State of Ohio has elected to participate in the Medicaid program and is obligated to comply with the requirements of Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq. Defendant* ODHS is responsible for supervising the administration of the Medicaid program in Ohio. Plaintiff Robert Chambers has resided in the Ohio nursing facility known as Echo Manor since May 1992 and became an institutionalized spouse at that time. Plaintiff Jean Chambers is Robert Chambers' wife and has never resided in a nursing facility; therefore, she is characterized as a community spouse. Plaintiff Lauren Holland has resided in the Ohio nursing facility known as Fair Haven since June 1993 and became an institutionalized spouse at that time. His wife, Sarah Holland, has never resided in a nursing facility and, therefore, is a community spouse.

On or about May 6, 1994, Lauren and Sarah Holland requested and received a resource assessment from the county department of human services. Their total countable resources amounted to $208,706.00. At the time of the resource assessment, Sarah Holland received monthly social security income in the amount of $417.00. The county department of human services also determined that Sarah Holland was entitled to a minimum monthly maintenance needs allowance ("MMMNA") in the amount of $1,230. It set her community spouse resource allowance ("CSRA") at $72,660.00.

Appendix C

On or about May 6, 1994, Lauren Holland applied for Medicaid. His application was denied, and the Hollands were informed by the county department that $72,660.00 was the maximum CSRA to which Sarah Holland was entitled. At the time of his application, Lauren Holland received monthly social security income in the amount of $857.00.

Allegations of the Complaint

The complaint alleges that under §1396r-5(e) (2) (C), a community spouse is entitled to a revision of the CSRA if the CSRA (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the MMMNA. With respect to the Hollands, the complaint alleges --that Sarah Holland's CSRA was inadequate to raise her income to the MMMNA. It further alleges that the Hollands were never advised by the nursing facility or defendants that Sarah Holland's CSRA could be revised. The complaint alleges that defendants have not provided community spouses receiving resource assessments with notice stating that they have a right to a fair hearing in order to obtain a revision to the CSRA if they establish that it is inadequate to raise the community spouse's income to the MMMNA.

The complaint alleges that Sarah Holland's CSRA should have been set at, or revised to, $208,706.00 although even this amount would not generate enough monthly income to allow her to meet the MMMNA. Plaintiffs allege that it has been ODHS' practice to condition Medicaid eligibility on the institutionalized and community spouses' spending down their resources to $1,500.00 above what it considers to be the maximum CSRA (presently $72,660.00).

Appendix C

Standard of Review

Summary judgment is governed by Rule 56(c) of the Federal Rules of Civil Procedure which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"[T]his standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) (emphasis in original); *Kendall v. The Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984).

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 247-248. The purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner*, 570 F.2d 107, 111 (6th Cir. 1978). Therefore, summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial, . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 467 (1962); *accord, County of Oakland v. City of Berkeley*, 742 F.2d 289, 297 (6th Cir. 1984).

In making this inquiry, the standard to be applied by the Court mirrors the standard for a directed verdict. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). *Anderson*, 477 U.S. at 250.

> The primary difference between the two motions is procedural: summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 745, n. 11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (footnote omitted); *accord, Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1455-56 (6th Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985). Inferences to be drawn from the underlying facts contained in such materials must be considered in the light most favorable to the party opposing the motion. *United States*

v. Diebold, Inc., 369 U.S. 654, 655 (1962); *Watkins v. Northwestern Ohio Tractor Pullers Association, Inc.*, 630 F.2d 1155, 1158 (6th Cir. 1980). Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. *Adickes*, 398 U.S. at 157-60; *Smith v. Hudson*, 600 F.2d 60, 65 (6th Cir. 1979), *cert. dismissed*, 444 U.S. 986 (1979).

If the moving party meets its burden and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. The mere existence of a scintilla of evidence in support of the opposing party's position will be insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Anderson*, 477 U.S. at 251 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872)). As is provided in Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Thus, "a party cannot rest on the allegations contained in his . . . [pleadings] in opposition to a properly supported motion for summary judgment against him." *First National Bank of*

Appendix C

Arizona v. Cities Service Co., 391 U.S. 253, 259 (1968) (footnote omitted).

Analysis

Defendants have moved to dismiss the complaint, or in the alternative, for summary judgment for the following reasons. First, defendants contend that ODHS is not a "person" within the meaning of 42 U.S.C. §1983 and an action cannot be maintained against it. Second, defendants argue that plaintiffs cannot obtain retroactive relief against either ODHS or its Director.[1] Third, defendants maintain that ODHS adopted a reasonable interpretation of the MCCA provisions, and this Court must give due deference to the agency's expertise in this area. Fourth, defendants claim that the Secretary of the United States Department of Health and Human Services ("HHS") is a necessary party to this lawsuit. If he is not joined, the case should be dismissed. Fifth, defendants argue that plaintiffs cannot state claims for violations of the notice and survey provisions as those provisions do not create private enforceable rights or provide for a private right of action.

Plaintiffs have also moved for summary judgment on six of their claims. First, plaintiffs claim that there is no dispute over the facts of this case. They also contend that the language of the statute is straightforward and unambiguous, and it clearly entitles plaintiffs to judgment as a matter of law. Second, plaintiffs claim that defendants are collaterally estopped from relitigating the issue of whether income or resources should be transferred to the community spouse. Defendants have already

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1. The defendants concede that plaintiffs can be awarded injunctive relief.

litigated this same issue in the courts of the State of Ohio. Plaintiffs contend that defendants should not be allowed to litigate this issue again in this Court. Third, plaintiffs argue that the notices provided by defendants are insufficient, and in fact, they are the same notices provided before the MCCA was enacted.

Defendants' Motion to Dismiss or for Summary Judgment[2]
Eleventh Amendment Argument

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the Untied States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Supreme Court has long held that the Eleventh Amendment prevents a federal court from entertaining a suit brought by a citizen against his own state. *Hans v. Louisiana*, 134 U.S. 1 (1890). As such, a State is immune from suit under the Eleventh Amendment. *Will v. Michigan Department of Stare Police*, 491 U.S. 58, 71 (1989). In the present case, ODHS, as an arm of the State of Ohio, is immune from suit and must be dismissed.

When a complaint under §1983 sues a defendant in his official capacity, then the suit is against the State itself. *Will*, 491 U.S. at 71. The Supreme Court also held in *Will* that officials acting in their official capacities are not "persons" under §1983

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2. Defendants' arguments on the merits of the action will be discussed in the section dealing with plaintiffs' motion for summary judgment.

and are absolutely immune from liability. *Id.* However, the Court stated in a footnote that "a State official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' " *Will,* 491 U.S. at 71, n. 10 (quoting *Kentucky v. Graham,* 473 U.S. 159, 167, n. 14 (1985) *Ex Parte Young,* 209 U.S. 123, 159-60 (1908)). "The Eleventh Amendment does not bar §1983 actions brought against state officials in their official capacities seeking prospective injunctive relief." *Williams v. Commonwealth of Kentucky,* 24 F.3d 1526, 1544 (6th Cir. 1994) (citations omitted). Therefore, plaintiffs' claims against defendant Tompkins, the Director of ODHS, can be heard by this Court.

Two of the plaintiffs claims arise under state law. To the extent that plaintiffs seek injunctive relief against defendants for violations of state law, these claims will be dismissed. Defendants rely on *Pennhurst State School & Hospital v. Nalderman,* 465 U.S. 89 (1984), to argue that plaintiffs' claims for injunctive and declaratory relief against them are barred by the Eleventh Amendment. In *Pennhurst,* the Supreme Court held that the Eleventh Amendment forbids federal courts from enjoining state institutions and state officials on the basis of state law. *Pennhurst,* 465 U.S. at 121. Therefore, pursuant to *Pennhurst,* the Eleventh Amendment bars plaintiffs' state law claims against defendants insofar as they seek injunctive relief.

Joinder of Secretary of Health and Human Services

Defendants argue that the Secretary of the United States Department of Health and Human Services is a necessary party to this lawsuit and should be joined under Rule 19, Fed. R. Civ. P. If the Secretary cannot be joined, then this action should

be dismissed. Plaintiffs counter that the Secretary is not an indispensable party and does not need to be joined to this lawsuit since the lawsuit involves no regulations promulgated by the Secretary or HHS nor any actions taken by HHS. Plaintiffs further states that even if the Secretary is determined to be a necessary party, this case should not be dismissed as the Secretary could be joined to the action.

Resolving a question of joinder under Rule. 19, Federal Rules of Civil Procedure, involves a three-step process. Initially, the Court must determine whether a person who is not a party should be joined in the action if possible. *Local 670 v. Int. Union, United Rubber, Etc., Workers,* 822 F.2d 613, 618 (6th Cir. 1987). This first step is embodied in Rule 19, Federal Rules of Civil Procedure, which provides in pertinent part:

> **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.
>
> **(b) Determination by Court Whenever Joinder not Feasible.** If a person as described in

> subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

If the Court determines that the person does not fall within one of the provisions under Rule 19(a), joinder, as well as further analysis, is unnecessary. *Local 670,* 822 F.2d at 618. If the Court finds that one of the criteria is satisfied, the person is one to be joined if feasible and the issue of personal jurisdiction arises. If personal jurisdiction is present, the party shall be joined. If it is not, the party cannot be brought before the Court. If such is the case, the Court proceeds to the third step which involves an analysis of the factors set forth in Rule 19(b) to determine whether the Court may proceed without the absent party or must dismiss the case due to the indispensability of that party.

"The rule is not to be applied in a rigid manner but should instead be governed by the practicalities of the individual case." *Local 670,* 822 F.2d at 618 (citing *Provident Tradesmen Bank & Trust Co. v. Patterson,* 390 U.S. 102, 116, n. 12 (1968)).

Rule 19 calls for a pragmatic approach; "simply because some forms of relief might not be available due to the absence of certain parties, the entire suit should not be dismissed if meaningful relief can still be accorded." *Id.* (citing *Smith v. United Brotherhood of Carpenters and Joiners of America,* 685 F.2d 164, 166 (6th Cir. 1982)).

The Court concludes that the Secretary of HHS is not a party to be joined if feasible because the criteria of Rule 19(a) have not been satisfied. First, complete relief can be accorded among the parties without the Secretary being present. Plaintiffs seek injunctive relief against a state official. Plaintiffs seek no relief that the Secretary could provide. Second, the Court is not satisfied that the Secretary claims any interest in the subject of this action. Assuming, *arguendo,* that he does, the Secretary is not so situated that disposition of this action in his absence may impair or impede his ability to protect his interest. Any determination made by this Court would not be binding on the Secretary. Nor does the Court conceive how the Secretary's absence could leave any of those already parties subject to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." The Secretary is not a person to be joined if feasible and defendants' motion to dismiss for nonjoinder is not well-taken.

Plaintiffs' Motion for Partial Summary Judgment
Transfer of Resources rather than Income

Plaintiffs claim that defendants have ignored the plain language of the MCCA's spousal impoverishment provisions thereby violating the statute. The relevant statute, 42 U.S.C. §1396r-5(e) (2) (C), provides:

Appendix C

> (C) Revision of the community spouse resource allowance. If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f) (2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

Plaintiffs contend that the language of the statute is clear and unambiguous. Plaintiffs argue that the statute provides for a revision of the CSRA if it is inadequate to meet the MMMNA and that the revision of the CSRA comes about from an infusion of resources, not income. In support of their position, plaintiffs rely on two decisions from the Ohio courts of appeal: *Kimnach v. Ohio Dept. of Human Services*, 96 Ohio App.3d 640 (Franklin Cty. 1994) and *Gruber v. Ohio Dept. of Human Services*, 98 Ohio App.3d 72 (Delaware Cty. 1994).

In *Kimnach*, the institutional spouse submitted an application for Medicaid benefits. His application was denied based on excess resources. He appealed the decision of the Franklin County Department of Human Services to the Court of Appeals for Franklin County assigning one error for consideration:

> The administrative agencies and the trial court erred, as a matter of law, by not revising the community spouse resource allowance as the proper revision would have resulted in Appellant not having excess resources attributed to him.

Kimnach, 96 Ohio App.3d at 643. The institutional spouse had resources well above the $1,500.00 limit for Medicaid eligibility but argued that the amount of income generated by the CSRA would be insufficient to meet his wife's MMMNA. *Id.*

The institutional spouse argued that, pursuant to §1396r-5, all of the resources must be considered as the CSRA and that they must be transferred to his wife. ODHS argued that the federal statute calls for the transfer of income first, not resources. *Id.*

The Court of Appeals held that the statute allowed the transfer of resources first in order to raise the initial CSRA so that the revised CSRA would generate sufficient income to meet the MMMNA. *Id.* at 646. The court also held that such revision occurred before Medicaid eligibility was determined as long as an application for benefits had been made on behalf of the institutionalized spouse. *Id.*; §1396r-5(e)(2)(C).

In *Gruber*, ODHS appealed the decision of the Court of Common Pleas of Delaware County which held that the institutionalized spouse could transfer resources, not income, to the community spouse in order to raise the income of the community spouse to meet the MMMNA. ODHS assigned that ruling of the court as error as well as the court's failure to give due deference to ODHS' interpretation of the its regulations. The Court of Appeals affirmed, adopting the reasoning of the Common Pleas Court.

In *Gruber*, ODHS relied on the Chicago Region Letter No. 51-93 by the Chicago Region of the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services. Ohio is part of the Chicago region. The court found that the language of the MCCA was

unambiguous and therefore not open to interpretation by the HCFA. "Subsection (e) (2) (C) mandates that if either spouse establishes that the CSRA is inadequate to generate sufficient income to meet the MMMNA, there shall be substituted for the CSRA under subsection (f) (2), an amount adequate to provide for such income to meet the MMMNA. This language is very specific to provide and mandate that the CSRA be raised to meet the MMMNA." *Gruber*, 98 Ohio App.3d at Appendix. The court determined that "[i]n applying MCCA to the facts of this case, resources must first be transferred to Mary Gruber in an attempt to raise Mary Gruber's income level to the MMMNA level." *Id.* at Appendix.

ODHS also argued that Ohio's implementation of MCCA provides that income, not resources, should be shifted first. ODHS relied upon Ohio Administrative Code §5101:6-7-02(A) (4) which provides in pertinent part:

> (4) If either the IS or CS can document that the CS resource allowance (in relation to the amount of income generated by it) is inadequate to raise the CS's income to the MMMNA, a hearing decision may substitute a higher resource allowance to provide additional income as necessary.

The Court rejected ODHS' interpretation of this statute finding that the section specifically states a "higher resource allowance" may be substituted, not income. The Court found that this section supported "the Court's analysis that resources, not income, must first be transferred to allow the CS to attain the MMMNA. *Gruber,* 98 Ohio App.3d at Appendix. Finding no room for differing interpretations in the statute, the Court did not defer to the agency's interpretation.

Appendix C

The exact issue that was before the *Kimnach* and *Gruber* courts is before this Court: whether the institutionalized spouse can transfer to his community spouse resources attributed to him, before he transfers income, in an attempt to raise the community spouse's income to the MMMNA. This Court agrees with the analysis of those courts in resolving this issue.

First, the Court notes that §1396r-S(f) permits the transfer of resources to the community spouse. Section 1396(f) (1) provides:

> An institutionalized spouse may, without regard to section 1396p(c) (1) of this title, transfer an amount equal to the [CSRA] (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the benefit of) the community spouse. The transfer under the preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

This section refers to the transfer of resources in the form of the CSRA. It also requires the *transfer* to occur as soon as practicable after eligibility is determined; it does not state that the *amount* of the CSRA must be made after eligibility is determined.

Second, the transfer of income is addressed in an entirely different section. Section 1396r-5 (d) (1) calls for an amount of income held by the institutional spouse to be applied toward monthly institutional costs. This provision also allows a deduction from this amount, the community spouse monthly income allowance, if the community spouse's income falls short

of the MMMNA. This deduction cannot occur until after eligibility is determined. Therefore, income cannot be transferred to the community spouse until eligibility is determined. Resources, however, can be transferred before eligibility is determined.

The Court concludes that "the plain and proper interpretation of the federal provisions is that the CSRA must be revised if a spouse shows that the original CSRA is inadequate to meet the MMMNA . . . [S]uch revision contemplates the transfer of resources." *Kimnach*, 96 Ohio App.3d at 647. The Court also concludes that, given the plain language of the MCCA, due deference is not warranted for ODHS' interpretation of the MCCA.[3]

Claims regarding Insufficient Notice

Plaintiffs have alleged that defendants have failed to adequately notify them of their rights under the MCCA, including but not limited to, the right to a fair hearing at which they may establish their entitlement to a revision of the CSRA. The complaint alleges the following:

> 12. Defendants prepared and transmitted to the nursing facilities in this state the document which is attached as Exhibit A. Defendants further instructed the nursing facilities to use Exhibit A as the notice required to be furnished by nursing facilities under federal law. Exhibit A is deficient and does not meet the notice requirements under federal or state law in

3. Having independently concluded that plaintiffs' motion is well-taken, it is not necessary for the Court to address the collateral estoppel argument.

that it does not adequately, correctly, and fully inform nursing facility residents of the requirements and procedures for establishing eligibility for Medicaid.

13. In addition to not complying with the written notice requirements under federal and state law, the nursing facilities in this state have not at any time relevant, complied with the said requirements under federal and state law regarding orally informing nursing facility residents in that they have not adequately, correctly, and fully informed nursing facility residents, orally, of the requirements and procedures for establishing eligibility for Medicaid.

14. Defendants are and have been aware, at all times relevant, that nursing facilities are and were not adequately, correctly, and fully informing nursing facility residents, orally and in writing, of the requirements and procedures for establishing eligibility for Medicaid, and have taken no corrective action, and have, in fact, misinformed nursing facilities, the nursing facility residents and their spouses and others involved in the Medicaid program, of the rights that nursing facility residents have under federal and state law.

Plaintiffs' main contention is that defendants have failed to provide sufficient notice to institutionalized and community spouses of their right to a fair hearing to revise the CSRA.

Appendix C

Section 1396r-5(e) provides in pertinent part:

(1) Notice

Upon —

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the: institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse, each State shall notify both spouses . . . of the method for computing the amount of the community spouse resources allowance permitted under subsection (f) of this section, and of the spouse's rights to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair Hearing

(A) In General

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of —

* * *

(v) the determination of the community spouse resource allowance (as defined in subsection (f) (2) of this section);

> Such spouse is entitled to a fair hearing described in section 1396(a) (3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

Section 1396a(a) (3) provides that "(a) State plan for medical assistance must provide for the granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness."

Defendants argue that these statutory provisions do not create enforceable rights for plaintiffs under §1983, and therefore, plaintiff cannot state a claim upon which relief can be granted. Defendants also argue that their notice requirements meet the standards provided by federal law in that they do adequately notify applicants for Medicaid of their right to a fair hearing.

42 U.S.C. §1983 provides a private cause of action for "the deprivations of any rights, privileges, or immunities secured by the Constitution and the laws" of the United States. Ever since *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), the Supreme Court has held that §1983 provides a private cause of action for violations of federal statutes as well as the Constitution. The coverage of §1983 is to be "broadly construed." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989). The Supreme Court has recognized only two exceptions under which statutory violations are not actionable:

> A plaintiff alleging a violation of a federal statute will be permitted to sue under §1983 unless (1) "the statute does not create enforceable rights, privileges, or immunities within the meaning of §1983," or (2) "Congress has foreclosed such enforcement of the statute in the enactment itself."

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 423 (1987)).

To determine whether the first of these two exceptions applies, the Court has developed a three-part test:

> (1) Was the provision in question intended to benefit the plaintiff?
>
> (2) Does the statutory provision in question create binding obligations on the defendant governmental unit, rather than merely expressing a congressional preference? and
>
> (3) Is the interest the plaintiff asserts specific enough to be enforced judicially, rather than being "vague and amorphous"?

Wilder, 496 U.S. at 509; *Golden State*, 493 U.S. at 106; *Wood v. Tompkins*, 33 F.3d 600, 605 (6th Cir. 1994). The plaintiff bears the burden of proving this exception does not apply. *Golden State*, 493 U.S. at 106.

As for the second exception, the only way Congress forecloses §1983 enforcement is by "providing a comprehensive

enforcement mechanism for protection of a federal right." *Golden State*, 493 U.S. at 106. The mere availability of administrative protections is not sufficient. *Id.* "Rather, the statutory framework must be such that allowing a plaintiff to bring a §1983 action would be inconsistent with Congress' carefully tailored scheme." *Id.* at 107. "We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for the deprivation of a federally secured right." *Id.* The defendant bears the burden of proving this exception applies. *Id.*

Although defendants set forth the correct test in their motion to dismiss or for summary judgment, plaintiffs have failed to respond to the motion. Instead, plaintiffs have argued that the statutes meet the four-factor test delineated by the Supreme Court in *Cart v. Ash*, 422 U.S. 66 (1975), to determine whether a federal statute permits a private right of action. This is a different inquiry than the one before this Court. Plaintiffs have sued under §1983. To determine whether plaintiffs can sue under §1983 for violation of these statutes, the inquiry is that under *Wilder*.[4] Nevertheless, the Court will conduct its own analysis to determine whether these statutes create enforceable rights under §1983.

The Court will first address the notice provisions. In addition to §1396r-5(e). set out above, plaintiffs complain that defendants have violated §§ 1396r(e) (6) and 1396r(c) (1) (B) as well. Section 1396r(e) (6) provides:

4. "This is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute. See *Cort v. Ash*, 422 U.S. 66 (1975). In implied right of action cases, we employ the four-factor Court test to determine 'whether Congress intended to create the private remedy asserted' for the violation of statutory rights." *Wilder*, 496 U.S. at 508 n. 9.

Appendix C

(6) Notice of Medicaid Rights

> Each State, as a condition of approval of its plan under this subchapter . . . must develop (and periodically update) a written notice of the rights and obligations of residents of nursing facilities (and spouses of such residents) under this subchapter.

Section 1396r(c) (1) (B) provides in part:

> A nursing facility must —
>
> (i) inform each resident, orally and in writing at the time of admission to the facility, of the resident's legal rights during the stay at the facility and of the requirements and procedures for establishing eligibility for medical assistance under this subchapter, including the right to request an assessment under section 1396r-5(c) (1) (B) of this title;
>
> (ii) make available to each resident, upon reasonable request, a written statement of such rights (which statement is updated upon changes in such rights) including the notice (if any) of the State developed under subsection (e) (6) of this section; . . .

Clearly, these provisions were intended for the benefit of plaintiffs in this case. Section 1396r-5(e)(2) states that either the institutionalized or community spouse is entitled to a fair hearing. Further, §§1396r(e) (6) and 1396r(c) (1) (B) require the State and nursing facilities to develop a written notice of a resident's rights and inform each resident of his or her rights. The first part of the *Wilder* test is satisfied.

The provisions also create binding obligations on the State and nursing facilities. Each state *must* develop and periodically update a written notice of the rights and obligations of nursing facility residents. At the time of admission, a nursing facility *must* inform each resident, both orally and in writing, of the resident's legal rights during his or her stay at the facility. The language is mandatory, making it binding on the State and the nursing facilities. The second prong of the *Wilder* test is satisfied.

The interest that the statute protects is also judicially enforceable. Contrary to defendants' assertions that the language of the provisions is "far too vague and amorphous create the right asserted by Plaintiffs," the Court concludes that the language is plain and straightforward in what it requires. The statutes mandate that the State and the nursing facilities provide (1) notice to the spouse that they are entitled to a fair hearing if they are dissatisfied with the determination of the CSRA, (2) develop and update a written notice of the rights and obligations of nursing facility residents, (3) inform the residents of these rights, orally and in writing, at the time of admission, and (4) make available to the residents, upon a reasonable request, a written statement of such rights. Such mandates are not too vague or amorphous that this Court cannot enforce them. The last prong of *Wilder* is satisfied.

Plaintiffs claim that defendants' notice of their right to a fair hearing under §1396r-5(e) (2) (C) violates that section as well as §1396r(e) (6). Defendants maintain that the notice supplied by them satisfies § 1396r-5 (e) (1) . The notice supplied by defendants regarding a hearing about the CSRA is set forth on the Resource Transfer Worksheet and the Notice of Denial of the Application for Assistance submitted with the February 24, 1995 Stipulations as Exhibits D and E. These documents

state the following with a few minor word changes between the two documents:

Your Right to a State Hearing

This notice is to tell you about a determination the county department of human services has made on your case. If you do not understand this determination, you should contact your caseworker. After discussing the reasons for the determination with your caseworker, it is possible that the county will change its decision or that you will agree with the determination.

If you do not agree with this determination, you have a right to a state hearing. A state hearing lets you or your representative (lawyer, welfare rights worker, friend or relative) give your reasons against the determination. The county department will also attend the hearing to present its reasons. A hearing officer from the Ohio Department of Human Services will decide whether you or the county department of human services is right.

If you want a hearing we must receive your request within 90 days of the mailing date of this notice. You do not need to return this notice if you agree with the action.

If someone else makes a written hearing request for you, it must include a written statement, signed by you, telling us that person is your representative, only you can make a request by telephone.

The notice then provides an 800 number for information on free legal services and two boxes for an applicant to check as to what type of hearing he requests.

Plaintiffs claim that this notice is the same one as was provided by ODHS before the MCCA was enacted. They also claim that it clearly fails to provide notice of a right to a fair hearing to revise the CSRA. Plaintiffs then compare the language provided by ODHS in their notice with that provided by other states. They contend that the notices supplied by other states clearly inform the applicant of his right to a fair hearing to revise the CSRA.

The Court is constrained to find that the notices do inform plaintiffs that they have a right to a fair hearing. The notice states in bold lettering that if the applicant does not agree with the county department of human services' determination, then he or she can appeal. This notice appears on the Resource Assessment Worksheet, the Resource Transfer Worksheet, and the Notice of Denial. Obviously, if the person does not agree with the Resource Assessment, then they are apprised of the fact that they have a right to a state hearing. They are also told of their right to appeal if the application for Medicaid is denied.

However, it would appear that the notice does not, in light of this Court's ruling, accurately "notify both spouses. . .of the method for computing the amount of the community spouse resources allowance permitted" as required by §1396r-5(e) (1) (B). Accordingly, defendant Tompkins is ORDERED to submit to the Court within thirty (30) days from the date of this Order a proposed notice together with a brief explaining how that notice complies with §1396r-5(e) (1) in light of the Court's

holding. Plaintiffs will then have fifteen (15) days to respond to that brief.

The Court will now address plaintiffs' claims regarding the survey and certification provisions of the MCCA. Section 1396r(g) (1) (A) provides:

> Under each State plan under this subchapter, the State shall be responsible for certifying, in accordance with surveys conducted under paragraph (2), the compliance of nursing facilities (other than facilities of the States) with the requirements of subsections (b), (c), and (d) of this section. The Secretary shall be responsible for certifying, in accordance with surveys conducted under paragraph (2), the compliance of State nursing facilities with the requirements of such subsections.

Section 1396r(h) (1) (B) provides:

> If a State finds, on the basis of a standard, extended, or partial extended survey under subsection (g) (2) of this section or otherwise, that a nursing facility no longer meets a requirement of subsection (b), (c), or (d) of this section, and further finds that the facility's deficiencies —
>
> (B) do not immediately jeopardize the health or safety of its residents, the State may —
>
> (i) terminate the facility's participation under the State plan,

(ii) provide for one or more of the remedies described in paragraph (2), or

(iii) do both.

Nothing in this paragraph shall be construed as restricting the remedies available to a State to remedy a nursing facility's deficiencies. If a State finds that a nursing facility meets the requirements of subsection (b), (c), and (d) of this section, but, as of a previous period, did not meet such requirements, the State may provide for a civil money penalty under paragraph (2) (A) (ii) for the days in which it finds that the facility was not in compliance with such requirements.

The specific remedies available to the State for enforcement are set forth in paragraph (2). The remedies include, the denial of payment under the State plan, civil money penalties, the appointment of temporary management, and the closure of the facility or the transfer of the residents.

Plaintiffs claim that defendants have violated these provisions by taking no corrective action despite their awareness that the nursing facilities have not been in compliance with §1396r(c) (1) (B). Defendants argue that plaintiffs have no enforceable rights in these provisions. Defendants also argue that Congress has foreclosed a private cause of action by setting up an elaborate statutory scheme for enforcement by the State.

Defendants contend that plaintiffs have no enforceable rights in §§1396r(g) and 1396r(h) because these provisions do not benefit plaintiffs, citing to *O'Bannon v. Town Court Nursing*

Center, 447 U.S. 773 (1980). However, the Court believes that plaintiffs do not have an enforceable right in these statutes because they do not create any binding obligations on the part of defendants.

Section 1396r(g) requires states to be responsible for certifying the compliance of nursing facilities with the requirements of subsections (b), (c), and (d) of §1396r. Plaintiffs have not alleged that the State of Ohio or ODHS has failed to do this. Instead, plaintiffs allege that they have taken no remedial action to correct the failure of the nursing facilities to adequately inform nursing facility residents of their rights. Such an allegation arises under §1396r(h) . However, this claim must also fail.

Section 1396r(h) does not create "binding obligations" on the State or ODHS. This section merely states that if a state finds, on the basis of a survey, that a nursing facility is no longer in compliance with §1396r and also finds that the residents are in no immediate jeopardy, then the state *may* either terminate the facility's participation under the state plan, provide for one or more remedies as listed in paragraph (2), or do both. The provision further states that "[n]othing in this paragraph shall be construed as restricting the remedies available to a State to remedy a nursing facility's deficiencies." Paragraph (2) of that section states that a State shall establish "at least the following remedies": denial of payment, a civil money penalty, appointment or temporary management, closure, or transfer of residents. The State can provide more remedies if it chooses to do so. Nor is it required to implement the remedies listed. Since the statutory provision does not create binding obligations on the part of the State, plaintiffs do not have enforceable rights in these provisions under §1983. Having found that plaintiffs do not have any enforceable rights under these sections, the

Appendix C

Court needs not address defendants' argument that Congress has foreclosed private enforcement.

Conclusion

For the reasons set out above, the Court **HOLDS** that defendants' December 2, 1994 motion to dismiss, or in the alternative, for summary judgment (doc. #8) is **GRANTED** with respect to plaintiffs' claims against the Ohio Department of Human Services, plaintiffs' claims under §§1396r(g) and 1396r(h), and plaintiffs' claims against defendant Tompkins under state law insofar as they seek injunctive relief. The Ohio Department of Human Services is **DISMISSED** from this lawsuit. The Court further **HOLDS** that plaintiffs' April 10, 1995 motion for partial summary judgment on claims four through nine (doc. #20) is **GRANTED** with respect to plaintiffs' claims under 42 U.S.C. §1396r-5(e) (2) (C) which the Court has found requires the transfer of resources in order to revise the community spouse resource allowance. Pursuant to this determination, defendant Tompkins is ORDERED to submit to the Court within thirty (30) days from the date of this Order a proposed notice which reflects this Court's Order and a brief explaining how that notice or the present notice complies with the statute and this Order. Plaintiff's will then have fifteen (15) days to respond to the proposed notice.

s/ Joseph Kinneary
United States District Judge

APPENDIX D — ORDER IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO FILED MARCH 31, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C-2-94-1094

Judge Kinneary

Magistrate Judge Abel

State of Ohio, ex rel, Robert Chambers, et al.,

Plaintiffs

v.

Ohio Department of Human Services, et al.,

Defendants

ORDER CERTIFYING A CLASS

Plaintiffs bring this action under 42 U.S.C. §1983 challenging the way the Ohio Department of Human Services ("ODHS") makes its resource assessment (and the notice given regarding that assessment) for married Medicaid applicants when one spouse is seeking assistance to meet the costs of a nursing facility or intermediate care facility and the other spouse continues to live in the community. This matter is before the Court on plaintiffs' motion to certify a class.

Appendix D

Although ODHS originally opposed class certification, the parties entered stipulations which were filed with the Court February 24, 1995 which include an agreement as to how the putative class should be defined. Upon a review of the facts set out in the February 24, 1995 stipulations, the Court concludes that plaintiffs have demonstrated the existence of a class meeting the requirements of Rule 23(a) and (b) (2) , Fed. R. Civ. P. It appears that the class is so numerous that joinder of all members is impracticable. There are clearly questions of law common to the class. The claims of the individual named plaintiffs are typical of those of members of the class and defendants have "acted or refused to act on grounds generally applicable to the class. . . ." Finally, the quality of the briefs and plaintiffs' counsel's experience litigating similar lawsuits in the Ohio courts establish that plaintiffs will fairly and adequately protect the interests of the class.

Accordingly, plaintiffs' motion to certify a class is GRANTED. The class so certified is defined as follows:

(A) Primary Class

All individuals in the State of Ohio who from January 1990 are, were, or in the future would be:

(1) "Institutionalized spouses" (defined at 42 U.S.C. §1396r-5(h) (1)) in Ohio nursing facilities, and "community spouses" (defined at 42 U.S.C. 1396r-5 (h) (2)) of individuals in Ohio Nursing facilities; and

(2) Who, upon admission of the "institutionalized spouse" to an Ohio nursing facility, did not, or would not, receive adequate notice of their rights and of the requirements and procedures for establishing eligibility for Medical Assistance, including the right

to request and receive an assessment under 42 U.S.C. §1396r-5(c) (1) (B), or were not, or would not be, provided with adequate written notice of their Medicaid rights, a notice required to be developed by the states pursuant to 42 U.S.C. §1396r(e) (6).

(B) Sub-Class

Those institutionalized spouses and their community spouses who are in the Primary Class and

(1) Have applied, could have applied, or will b e applying for Medicaid,

(2) were, are, or become institutionalized spouses (defined at 42 U.S.C. §1396r-5(h) (2)),

(3) who, at the time of institutionalization, had countable resources of $1,500,

(4) were or are married to a community spouse who had or has monthly income of less than the applicable MMMNA, and

(5) who could have or could now, or in the future, establish that the amount of income generated by the community spouse resource allowance, when added to the community spouse's income, is inadequate to raise the community spouse's income to the applicable MMMNA.

s/ Joseph Kinneary
United States District Judge